No. 97-1943-CFX Title: Karen Sutton and Kimberly Hinton, Petitioners
v.
United Air Lines, Inc.

Docketed: June 3, 1998 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Jun 1 1998	Petition for writ of certiorari filed. (Response due July 18, 1998)
	Jun 22 1998	Order extending time to file response to petition until July 18, 1998.
	Jul 20 1998	Brief of respondent United Air Lines, Inc. in opposition filed.
	Jul 29 1998	DISTRIBUTED. September 28, 1998
	Oct 5 1998	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Dec 21 1998	Brief amicus curiae of United States filed.
	Jan 4 1999	REDISTRIBUTED. January 8, 1999
	Jan 8 1999	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 22, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 24, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 12, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT April 28, 1999.
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	Feb 22 1999	Joint appendix filed.
	Feb 22 1999	Brief of petitioners Karen Sutton and Kimberly Hinton filed.
	Feb 22 1999	Brief amicus curiae of AFL-CIO filed.
	Feb 22 1999	Brief amicus curiae of American Civil Liberties Union filed.
	Feb 22 1999	Brief amicus curiae of National Employment Lawyers Association filed.
	Feb 22 1999	Brief amici curiae of AIDS Action, et al. filed.
	Feb 22 1999	Brief amici curiae of United States and Equal Employment Opportunity Commission filed.
	Feb 22 1999	Brief amici curiae of Senators Harkin and Kennedy, et al. filed.
	Mar 9 1999	Record filed.
	Mar 11 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 17 1999	CIRCULATED.
	Mar 22 1999	Record filed.
	Mar 23 1999	Brief amicus curiae of Society of Human Resource Management filed.
	Mar 24 1999	Brief of respondent United Air Lines, Inc. filed.
	Mar 24 1999	Brief amici curiae of Equal Employment Advisory Council, et al filed.
	Mar 24 1999	Brief amicus curiae of LPA, Inc. filed.
	Mar 24 1999	Brief amicus curiae of Air Transport Association of America

No. 97-1943-CFX

Entry	Date	Proceedings and Orders
		filed.
	Mar 24 1999	LODGING consisting of three spiral bound copies of material cited and submitted by counsel for amicus Air Transport Association, Inc.
	Mar 29 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 9 1999	Reply brief of petitioners Karen Sutton and Kimberly Hinton filed.
	Apr 28 1999	ARGUED.
	Apr 29 1999	Motion of respondent for leave to file a supplemental brief after argument filed.
	Apr 30 1999	Motion of the Solicitor General for leave to file a supplemental brief, as amicus curiae, after argument filed.

Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KAREN SUTTON AND KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

VAN AARON HUGHES
Counsel of Record for Petitioners
TUCKER K. TRAUTMAN
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, CO 80020
Telephone: (303) 464-9409

Attorneys for Petitioners

58 pp

QUESTIONS PRESENTED

1. Where an airline pilot's uncorrected vision is so poor that it constitutes a physical impairment under the Americans with Disabilities Act, is the pilot nevertheless excluded from protection under the Act if her vision can be corrected?

2. Should courts defer to the EEOC Interpretive Guidance that disabilities should be analyzed in their uncorrected state?

3. Is a commercial pilot regarded as disabled by a major airline that refuses to employ her as a pilot for that airline due to her poor vision?

TABLES OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT FOR GRANTING THE WRIT	5
I. THE TENTH CIRCUIT'S HOLDING THAT ANALYSIS OF DISABILITIES SHOULD INCLUDE AVAILABLE CORRECTIVE MEASURES THROWS INTO TURMOIL THIS IMPORTANT AREA OF THE LAW	6
A. The Tenth Circuit's Decision Greatly Exacerbates the Conflict Among the Circuits Regarding Corrective Measures under the ADA	6
B. The Tenth Circuit's Decision Is at Odds with the EEOC's Interpretation and Worsens Confusion as to Deference to Be Afforded the Agency's Guidance	9
II. THE TENTH CIRCUIT'S HOLDING THAT PETITIONERS ARE NOT REGARDED AS DISABLED CONFLICTS WITH THE RULE THAT THE DEFENDANT'S PERCEPTION NEED NOT BE COMMON TO THE INDUSTRY	11
CONCLUSION	14

APPENDIX

	PAGE
Opinion of the United States Court of Appeals for the Tenth Circuit filed November 26, 1997	A-1
Order of the United States Court of Appeals for the Tenth Circuit Filed March 3, 1998	A-26
Memorandum Opinion and Order of the United States District Court for the District of Colorado filed August 28, 1996	A-27

TABLE OF AUTHORITIES

	PAGE
CASES	
Arnold v. United Parcel Serv., 136 F.3d 854 (1st Cir. 1998)	7-10
Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905 (1997)	11
Baulos v. Roadway Express, Inc., 139 F.3d 1147 (7th Cir. 1998)	13
Best v. Shell Oil Co., 107 F.3d 544 (7th Cir. 1997)	13
Byrne v. Bd. of Education, 979 F.2d 560 (7th Cir. 1992)	13
Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	9, 10
Cline v. Fort Howard Corp., 963 F. Supp. 1075 (E.D. Okla. 1997)	6
Coghlan v. H.J. Heinz Co., 851 F. Supp. 808 (N.D. Texas 1994)	6
Cook v. Rhode Island Dep't of Mental Health, Retardation & Hosps., 10 F.3d 17 (1st Cir. 1993)	12
Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499 (7th Cir. 1998)	12
Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct 693 (1998)	7
Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996)	7, 8
Fallacaro v. Richardson, 965 F. Supp. 87 (D.D.C. 1997)	6
Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998)	7
Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986)	13
Gaddy v. Four B Corp., 953 F. Supp. 331 (D. Kan. 1997)	6, 8
General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)	10
Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997)	7

	PAGE
Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996)	7, 8, 10
Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997)	7, 8
Martin v. Occupational Safety and Health Review Com'n, 499 U.S. 144 (1991)	11
Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3d Cir. 1997)	7, 8, 10
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)	10, 11
Murphy v. United Parcel Serv., 1998 WL 105933 (10th Cir. March 11, 1998)	8
Olson v. Dubuque Community School Dist., 137 F.3d 609 (8th Cir. 1998)	10
Piquard v. City of East Peoria, 887 F. Supp. 1106 (C.D. Ill. 1995)	6
Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995)	7
Sarsycki v. United Parcel Serv., 862 F. Supp. 336 (W.D. Okla. 1994)	6
Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437 (W.D. Wis. 1996)	6
Sicard v. City of Sioux City, 950 F. Supp. 1420 (N.D. Iowa 1996)	10
Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994)	10
Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898 (E.D. Pa. 1997)	6, 10
STATUTES AND REGULATIONS	
5 U.S.C. § 552 (1994)	*9*
28 U.S.C. § 1254(1) (1994)	*2*
42 U.S.C. § 12102 (1994)	*passim*
42 U.S.C. § 12116 (1994)	*9*
29 C.F.R. § 1630.2(j) (1997)	*passim*

PAGE

29 C.F.R. § 1630, App. § 1630.2(h) & (j)(2) (1997) . . . . . *passim*

LEGISLATIVE HISTORY

H.R. Rep. No. 101-485 (II) (1990) 8
H.R. Rep. No. 101-485 (III) (1990) 8, 12
S. Rep. No. 101-116 (1990) 8

No. _____

IN THE

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OCTOBER TERM, 1997

KAREN SUTTON AND KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Karen Sutton and Kimberly Hinton ("Petitioners" or "Pilots") respectfully request that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Tenth Circuit entered on November 26, 1997. The Tenth Circuit affirmed the order of the United States District Court for the District of Colorado dismissing the Pilots' claims against Respondent United Air Lines, Inc. ("United").

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 130 F.3d 893, and is reproduced in the Appendix at A-1. The Order of the United States District Court for the District of Colorado is reproduced in the Appendix at A-27.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1997. (Appendix A-1.) Pilots' Petition for Rehearing and Suggestion for Rehearing En Banc was denied on

March 3, 1998. (Appendix A-26.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES AND REGULATIONS INVOLVED

Section 3(2) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (1994), provides:

(2) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Section 1630.2(j) of the Americans with Disabilities Act of 1990 Regulations, 29 C.F.R. § 1630.2(j) (1997), provides in pertinent part:

(j) Substantially limits—

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the majo[r] life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs

utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

EEOC Interpretive Guidance for § 1630.2(j), 29 C.F.R. § 1630, App. § 1630.2(h) & (j)(2) (1997), provides in pertinent part:

(h) ...The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid....

(j)(2) ...The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices....

STATEMENT OF THE CASE

Petitioners are twin sisters who are extremely well qualified and credentialed to be airline pilots. They currently are commercial pilots for commuter airlines, however it is their lifelong goal to fly for a major global air carrier.

As alleged in their Amended Complaint, the Pilots' vision is poorer than the standard for legal blindness for many purposes.

Specifically, both of the Pilots have uncorrected vision of 20/200 or worse in the right eye, and 20/400 or worse in the left eye. Without the use of corrective measures, Petitioners cannot conduct such basic activities as driving an automobile or watching television. When wearing glasses or contact lenses, however, the Pilots' corrected vision is 20/20, and the FAA has awarded both a first class medical certificate.

Petitioners applied to United for employment as pilots. United invited the Pilots to interview at its Denver Flight Training Center, and administered a flight simulator test to Petitioner Hinton, on which she performed well. Nevertheless, United rejected Petitioners from any consideration as pilots due to their vision. United requires applicants to have uncorrected vision of 20/100 or better in order to be considered for any of its thousands of pilot positions around the world, regardless of model of aircraft, air route, or flight conditions.[1] United asserts that this is a rational safety requirement, but Pilots have alleged that the requirement reflects only stereotype, myth, or unsubstantiated fears, and bears no relationship to safety. Indeed, Petitioners believe that United does not apply its vision requirement to current pilots in its own fleet.

The Pilots brought suit against United under Section 3(2) of the Americans With Disabilities Act ("Act"), 42 U.S.C. § 12102(2) (1994). They alleged that United violated the Act by rejecting them because they were disabled, or because United regarded them as disabled. Plaintiffs sought legal and equitable relief provided for in the Act, including injunctive relief ordering United not to apply unlawful criteria in future hiring decisions.

The district court granted United's motion to dismiss the Pilots' action. United did not dispute that the Pilots were disqualified from its pilot positions because of their impaired vision. Nevertheless, the district court held that the Pilots' vision is not a

[1] Other global air carriers have similar vision requirements, although Petitioners have been able to fly commercially for commuter airlines.

substantially limiting impairment within the meaning of the ADA. The court of appeals affirmed. The court of appeals concluded that the Pilots are physically impaired within the meaning of the ADA, but are not substantially impaired in the major life activity of seeing when the corrective measures of glasses or contact lenses are considered. The court expressly acknowledged that its holding was directly contrary to interpretive guidelines of the Equal Employment Opportunity Commission ("EEOC") and to decisions of the Eighth, Ninth, and Eleventh Circuits. (Appendix A-14 to A-16 & n.7.)

ARGUMENT FOR GRANTING THE WRIT

The decision below clouds an important area of the law, exacerbating the conflict among the circuits as to whether corrective measures should be considered in analyzing disabilities under the ADA. The lower court's holding that corrective measures should be taken into account expressly conflicts with the rule of the majority of circuit courts to have considered the issue. It also rejects the guidance of the EEOC on this issue, thus worsening the existing confusion as to the proper deference to be afforded the EEOC's guidance.

Alternatively, the court below confused the state of the law by ruling that Pilots did not adequately allege that United regarded them as disabled. The court reasoned that the Pilots were not barred from all pilot positions at all airlines, which conflicts with the prevailing rule that, in applying the "regarded as" standard, courts must focus upon the attitudes of the defendant employer and not others in the industry.

I. THE TENTH CIRCUIT'S HOLDING THAT ANALYSIS OF DISABILITIES SHOULD INCLUDE AVAILABLE CORRECTIVE MEASURES THROWS INTO TURMOIL THIS IMPORTANT AREA OF THE LAW.

A. The Tenth Circuit's Decision Greatly Exacerbates the Conflict Among the Circuits Regarding Corrective Measures under the ADA.

The Tenth Circuit agreed with Petitioners that their uncorrected vision constituted a disability within the meaning of the ADA. It held, however, that this impairment does not "substantially limit[ ] one or more . . . major life activities" because it can be corrected with glasses or contact lenses. 42 U.S.C. § 12102(2)(A). The Tenth Circuit recognized that the circuits have split on the issue of whether disability inquiries under the ADA should be made without regard to such mitigating or corrective measures. (Appendix A-14, A-15 nn.7 & 8.) It also recognized that its holding is contrary to the EEOC's view that corrective measures should not be considered. (Appendix A-16.) By joining those courts rejecting the EEOC's view, the Tenth Circuit has significantly deepened the conflict among the circuits in this important area of the law.

The Tenth Circuit correctly observed that by the time of its decision, several published district court opinions divided widely on this issue.[2] For a short period, however, there was apparent unanimity among the courts of appeals. The Seventh, Eighth,

[2] *Compare Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (holding under Rehabilitation Act against consideration of mitigating measures of contact lenses); *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 902-07 (E.D. Pa. 1997) (same holding under ADA); *Piquard v. City of East Peoria*, 887 F. Supp. 1106, 1129 (C.D. Ill. 1995) (same); *Sarsycki v. United Parcel Serv.*, 862 F. Supp. 336, 340 (W.D. Okla. 1994) (following EEOC interpretation) *with Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1081 n.6 (E.D. Okla. 1997) (asserting that courts should evaluate vision impairment with regard to corrective devices); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997) (rejecting EEOC interpretation); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) (same); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Texas 1994) (same).

Ninth, and Eleventh Circuits had all agreed that disabilities must be analyzed without regard to medications, prostheses or other possible corrective measures.[3] *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. June 16, 1997) (holding, specifically in the context of impaired vision, that "analysis of whether [plaintiff] is disabled does not include consideration of mitigating measures"), *cert. denied*, 118 S. Ct. 693 (1998); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (same holding); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996) (holding that disabilities must be assessed without regard to mitigating measures); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 1349 (1997). At the circuit court level, only *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-92 n.3 (5th Cir. 1996), contained language arguably to the contrary.[4]

On September 2, 1997, however, the Sixth Circuit held that disability determinations should be made in light of the effect of medications or other corrective measures. *Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997) (as modified on October 30, 1997) (discussion contained in concurrence of two of three circuit judges). The Sixth Circuit so interpreted the language of the ADA notwithstanding the EEOC's contrary position, supported by legislative history of the ADA. *Id.* at 767.

The Tenth Circuit's decision, also squarely rejecting the EEOC's view against consideration of corrective measures, removes any doubt as to the extent of division among the lower

[3] More recently, the First and Third Circuits have reached the same conclusion. *Arnold v. United Parcel Serv.*, 136 F.3d 854 (1st Cir. 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997).

[4] The Fifth Circuit implied, but did not squarely hold, that it would take into account corrective measures, noting that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity." *Id.*; *but see Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800,805 (5th Cir. 1997) (quoting EEOC guideline against consideration of mitigating measures without discussion), *cert. denied*, 118 S. Ct. 1050 (1998).

courts. This conflict is now ripe for determination by this Court. No purpose can be served by tolerating two widely divergent interpretations of the ADA in the various courts that have considered this question, or abandoning litigants in those jurisdictions which have not yet reached this issue to complete uncertainty as to how this important federal legislation will be interpreted.

As the many decisions cited above amply illustrate, this conflict impacts a very wide range of disabilities that may be affected by various types of corrective measures. Examples of the types of corrective measures for disabilities at issue in these cases include medication for illnesses, *e.g.*, *Harris*, *supra* (Graves' disease could potentially be treated); *Arnold*, *supra* (diabetes potentially could be ameliorated through medication); *Matczak*, *supra* (same), therapy for physical or psychological disorders, *e.g.*, *Holihan*, *supra* (activities undertaken as treatment for depression); *Ellison*, *supra* (breast cancer treated with radiation therapy), and hearing aids or other devices. *E.g.*, *Gaddy*, *supra* (asthma treated with inhaler and breathing machine). The Tenth Circuit has already extended its reasoning in the instant case to hold that high blood pressure must be analyzed accounting for potentially available treatment with medication. *Murphy v. United Parcel Serv.*, 1998 WL 105933 (10th Cir. March 11, 1998).

The view of the Sixth and Tenth, and possibly Fifth, Circuits would thus carve out entire categories of disabled persons who would otherwise enjoy the protections of the ADA, despite legislative history to the contrary.[5] The Tenth Circuit's restriction on the effect of the ADA significantly undercuts the goal of the Act

[5] The relevant legislative history supports the view that the ADA is applicable without regard to corrective measures. *See* S.Rep. No. 101-116, at 23 (1990); H.R. Rep. No. 101-485(II), at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid."); H.R. Rep. No. 101-485(III), at 28, *reprinted in* 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").

"to protect individuals who have an underlying medical condition or other limiting impairment, but who are in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures." *Arnold*, 136 F.3d at 861. Such a dramatic limitation on the reach of this important statute warrants this Court's attention.

B. The Tenth Circuit's Decision Is at Odds with the EEOC's Interpretation and Worsens Confusion as to Deference to Be Afforded the Agency's Guidance.

The decision below is significant not only for the result it reaches, but also for the lower court's cavalier attitude toward the EEOC's interpretation of the controlling provisions of the ADA. By showing no deference to the agency's guidance, the lower court further disrupts the already murky rule of law as to the appropriate deference to afford.

As evidenced by the split among the circuits, there is more than one possible interpretation of the ADA's definition of "disability." 42 U.S.C. § 12102(2)(A). In conjunction with its regulations to carry out the directives of the ADA, *see* 42 U.S.C. § 12116 (1994) (requiring EEOC to issue regulations), the EEOC issued its Interpretive Guidance, which construes the provision in question to mean that both the existence of an impairment, and the determination of whether that impairment substantially limits a major life activity, must be made on a case by case basis, "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630, App. § 1630.2(h) & (j)(2) (1997). Typically, courts would be obligated to adhere to the agency's construction of the statute, so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

This Court has instructed, however, that an agency's interpretive guidelines, as opposed to regulations promulgated under the Administrative Procedure Act, 5 U.S.C. § 552 (1994), are not

necessarily binding upon courts, but rather "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

Even before this case arose, courts exhibited confusion in attempting to apply *Chevron* and *Meritor* to determine the proper level of deference to be afforded EEOC interpretive pronouncements regarding the ADA. In *Harris v. H&W Contracting, supra*, the Eleventh Circuit applied *Chevron*, and concluded that it could not disregard the EEOC's Guidance. 102 F.3d at 521. The court in *Wilson v. Pennsylvania State Police Dep't,* 964 F.Supp. 898, 903-05 (E.D. Pa. 1997), gave *Chevron* deference to the EEOC's guideline on corrective measures, specifically in the context of impaired vision. The court noted that the EEOC Guidance was subject to public notice and comment, and carried more weight than typical interpretive rules. *Id.* at 903 n.4.

The Third Circuit in *Matczak* stated that the EEOC Guidance does not command the same deference as the underlying regulations, but still concluded that courts must give the EEOC's guidelines controlling weight unless plainly erroneous. 136 F.3d at 937 (citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Sicard v. City of Sioux City,* 950 F.Supp. 1420 (N.D. Iowa 1996) (applying deference in context of impaired vision). Other courts interpreting the same language have apparently not given the EEOC Guidance controlling weight, but some lower yet significant level of deference. *E.g., Arnold*, 136 F.3d at 866; *cf. Olson v. Dubuque Community School Dist.*, 137 F.3d 609, 612 (8th Cir. 1998) (EEOC enforcement guidance entitled to deference).

Each of these courts was careful to give some level of deference to the EEOC Guidance, although they are inconsistent as to exactly how much deference to give. In contrast, here the Tenth Circuit expressly did not defer to the expertise of the EEOC, stating only that the "Guidance may be entitled to some consideration in our analysis." (Appendix A-9 n.3.) The lower

court's approach is at odds with *Meritor* and is markedly different from this Court's pattern of showing deference even to informal agency pronouncements. *See Auer v. Robbins,* 519 U.S. 452, 117 S. Ct. 905, 911-12 (1997) (giving deference to position of Secretary of Labor stated in a legal brief); *Martin v. Occupational Safety and Health Review Com'n*, 499 U.S. 144, 157 (1991) (informal interpretive rules are entitled to some weight on judicial review).

The EEOC's Guidance and other publications encompass a range of issues under the ADA well beyond the question of corrective measures addressed by the court below. This Court's clarification of the deference due the EEOC's interpretation of the ADA is of tremendous importance. At present, particularly in light of the Tenth Circuit's opinion, employers and employees cannot predict with accuracy whether EEOC guidelines will be respected in a court of law.

II. THE TENTH CIRCUIT'S HOLDING THAT PETITIONERS ARE NOT REGARDED AS DISABLED CONFLICTS WITH THE RULE THAT THE DEFENDANT'S PERCEPTION NEED NOT BE COMMON TO THE INDUSTRY.

An independent basis for Petitioners' action is the allegation that they were regarded as having an impairment by United with respect to a class of jobs. 42 U.S.C. § 12102(2)(C) (1994). The court below rejected this claim because "the 'class of jobs' to which Plaintiffs must compare themselves is that of all pilot positions at all airlines." (Appendix A-22.) This holding is directly at odds with the prevailing rule that it is the individual employer's perception at issue under the "regarded as" standard, again generating unacceptable confusion and undermining the purpose of the statute.

The Seventh Circuit recently summarized the majority rule that, unlike the actually disabled prong of the ADA, the

"regarded as" disabled standard centers upon the specific employer's perceptions:

> Section 12102(2)(A) looks for proof beyond the plaintiff's inability to satisfy the expectations of a single employer; to be "substantial," a limitation on the ability to work must be one that affects the plaintiff's ability to perform a class or range of jobs before it qualifies as a disabling limitation under the ADA. For purposes of § 12102(2)(C), *the employer's perception* of the plaintiff's inability to work must have a comparable breadth. A perception that [her disability] rendered [plaintiff] unfit to work as a psychotherapist, for example, might bring her within the scope of 12102(2)(C).

Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, (7th Cir. 1998) (emphasis added) (footnote and multiple citations omitted). Under this rule, United falls within the scope of the "regarded as" test if it perceives Petitioners as unfit to work as pilots.

In its opinion, the Tenth Circuit gave lip service to the premise that "[i]t is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters." (Appendix A-22) (citing *Cook v. Rhode Island Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 25-26 (1st Cir. 1993) ("regarded as" prong "does not condition . . . claims on either the quantum of a plaintiff's application efforts or on her prospects of finding other employment")). This is only logical; the perceptions of other airlines would be relevant to a determination of whether Pilots actually are substantially impaired in the life activity of working, but not to the issue of whether *United* so perceives them. *See* House Judiciary Report, at 30, 1990 U.S.C.C.A.N. at 453 (person perceived by employer as disabled is "regarded as" disabled whether or not employer's perception is shared by others in the field).

Yet the court below quickly abandoned this basic rule by focusing upon the availability to Pilots of jobs with other employers in the industry. The Court disregarded the simple fact that

United will not hire Pilots because it regards them as disabled.[6] It instead considered whether other employers may hire them, which depends of course upon whether those employers also regard Pilots as disabled. Even though other global air carriers follow the same vision standard as United, the court seized upon the fact that Petitioners found work with a commuter airline to preclude their claim. Thus, the Tenth Circuit's approach imposes through the back door the requirement that Pilots must be regarded as disabled by *all* employers, not just United.

By implicitly revising the "regarded as" standard, the court below has once more broken with existing authority. Moreover, its holding effectively renders the "regarded as" prong meaningless. Under its decision, an employer cannot be liable unless all other employers also prohibit the plaintiff from working, in which case the employee's claim might as easily be stated under the actually disabled standard. Meanwhile, an individual employer may with impunity unilaterally discriminate against employees it incorrectly perceives to be disabled. In light of the mischief the Tenth Circuit's holding would do to this provision of the ADA, this Court's attention is required to resolve the issue.

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[6] United will not hire Pilots for *any* of their pilot positions. This is not a preclusion that applies only to a particular, isolated position. *Compare Byrne v. Bd. of Education*, 979 F.2d 560, 566 (7th Cir. 1992) (asthma prevented teacher from teaching at two specific schools, but not at other schools within the same district); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) (acrophobic employee precluded from performing repairman position at a particular facility requiring him to climb multiple stairs and ladders). United's vision standard affects a class of jobs in that it is not limited to particular pilot positions, just as the Seventh Circuit has recently held in the analogous context of truck drivers hampered by disabilities. *See Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997) (finding genuine issue of fact as to whether employer regarded driver with injured knee as disabled where it disallowed him from performing any truck driving positions); *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147 (7th Cir. 1998) (sleep disorder that precluded driver from sleeper trucks but not from other driving positions offered by employer did not affect a class of jobs).

CONCLUSION

The decision below creates or exacerbates conflicts among the circuits in important areas of federal employment law, and threatens to undermine the purposes of the ADA and to render meaningless the EEOC's guidance. A writ of certiorari should issue to review the Tenth Circuit's decision.

Respectfully submitted this
1st day of June, 1998.

VAN AARON HUGHES
Counsel of Record for Petitioners
TUCKER K. TRAUTMAN
Ireland, Stapleton, Pryor & Pascoe, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, CO 80020
Telephone: (303) 464-9409
Attorneys for Petitioners

PUBLISH

KAREN SUTTON AND KIMBERLY HINTON,

Plaintiffs-Appellants,

v.

UNITED AIR LINES, INC.,

Defendant-Appellee.

No. 96-1481.
United States Court of Appeals,
Tenth Circuit.
Nov. 26, 1997.

Lisa Hogan (Patrick F. Carrigan and Beth A. Doherty Quinn with her on the brief) of Brownstein, Hyatt, Farber & Strickland, Denver, CO, for appellee. Shawn D. Mitchell of Ireland, Stapleton, Pryor & Pascoe, Denver, CO, for appellants.

Before BRORBY, BARRETT, and McKAY Circuit Judges.

BARRETT, Senior Circuit Judge.

Karen Sutton and Kimberly Hinton (collectively referred to as Plaintiffs) appeal the district court's dismissal of their Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., discrimination claims for failure to state a claim upon which relief may be granted. See *Sutton v. United Airlines, Inc.*, No. 96-S-121, 1996 WL 588917 (D.Colo. Aug. 28, 1996). For the following reasons, we affirm.

Background

Plaintiffs, who are twin sisters, are currently commercial airline pilots for regional commuter airlines. However, they share a "life long goal to fly for a major air carrier." In 1992, Plaintiffs applied for commercial airline pilot positions with United Air Lines, Inc. (United) and were invited to interview in Denver, Colorado. At their interviews, Plaintiffs were informed

that their uncorrected vision disqualified them from pilot positions with United, in that applicants for pilot positions must have uncorrected vision of 20/100 or better in each eye. Plaintiffs' uncorrected vision is 20/200 in the right eye and 20/400 in the left eye. [FN1] Plaintiffs' corrected vision is 20/20 in both eyes.

FN1. A person with visual acuity of 20/200 can see an object from 20 feet only as well as a person with 20/20 vision can see an object at 200 feet.

Plaintiffs Amended Complaint, filed pursuant to the ADA, alleged that United discriminated against them in the hiring process by rejecting their applications because of their "disability," their uncorrected vision, and/or because United regarded them as disabled. Plaintiffs asserted they are disabled under the ADA because their uncorrected vision substantially limits their major life activity of seeing. They averred their vision limitations are permanent and that without corrective measures, they would "effectively be unable to see" well enough to conduct normal everyday activities such as driving, watching television, or shopping. In addition, Plaintiffs alleged United regarded them as disabled in violation of the ADA because United's policy of requiring uncorrected vision of 20/100 or better blocks Plaintiffs from an entire class of employment, global airline pilots, without any objective evidence of job relatedness or safety.

On August 28, 1996, the district court granted United's motion to dismiss. The court concluded that Plaintiffs' Amended Complaint failed to state a claim under the ADA. The district court ruled that Plaintiffs were not disabled within the meaning of the ADA because their vision did not substantially limit a major life activity. The court stated that with corrective measures Plaintiffs' were "able to function identically to individuals without a similar impairment" and as such Plaintiffs were not substantially limited in the major life activity of seeing. *Sutton*, 1996 WL 588917, at *3. The court reasoned that "[t]o adopt a definition of 'disabled' that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the

ADA. Millions of Americans suffer visual impairments no less serious that those of the Plaintiffs. Under such an expansive reading, the term 'disabled' would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect." *Id.* at *5. With respect to Plaintiffs' claim that United regarded them as disabled in violation of the ADA, the district court found no support for Plaintiffs' allegation that United regarded them as substantially impaired in the major life activity of seeing based on stereotype, myth, or unsubstantiated fears. › Id. At best, the court reasoned that Plaintiffs established that United regarded them as "unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at *6.

On appeal, Plaintiffs contend the district court erred in dismissing their Amended Complaint for failure to state a claim under the ADA. Plaintiffs assert that they alleged sufficient facts to establish that: (1) they were qualified applicants with a disability because they are substantially limited in the major life activity of seeing, and (2) United regarded them as having a substantially limiting impairment because its policy deprives them of employment throughout the global air carrier industry with no rational job-related basis. Plaintiffs argue that the district court erred in evaluating their physical impairment, their vision, with the benefit of corrective measures, in direct contradiction to the Equal Employment Opportunity Commission's (EEOC) Interpretive Guidance, which provides that the determination of whether an individual has a physical impairment and whether an individual is disabled within the meaning of the ADA must be done without regard to mitigating or corrective measures.

United responds that Plaintiffs' vision does not constitute a "physical or mental impairment" within the meaning of the ADA and that, even if it does, it does not "substantially limit" a major life activity. First, United contends that a minor, relatively common condition, such as Plaintiffs' nearsightedness and subsequent need for glasses, is not an impairment under the ADA. Second, United asserts that even if Plaintiffs are impaired within

the meaning of the ADA, the EEOC's Interpretive Guidance, stating that disability determinations be made without regard to mitigating or corrective measures, is in direct conflict with the ADA's statutory requirement that a disability be a physical or mental impairment that "substantially limit[s] one or more of the major life activities of such individual." See 42 U.S.C. S 12101(2). United argues that to evaluate a disability without regard to mitigating measures would read out the ADA's statutory requirement that the impairment be "substantially" limiting. United reasons that if an individual can utilize corrective measures to mitigate the effects of an impairment to a degree such that there is no substantial limitation on a major life activity, then the individual is not disabled within the meaning of the ADA. Finally, United asserts that Plaintiffs can offer no substantive evidence it regarded them as anything other than as unable to meet the rational job-related safety requirements of the jobs they sought.

We review the district court's dismissal of a complaint for failure to state a claim upon which relief may be granted de novo. *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 111 F.3d 1485, 1490 (10th Cir.1997). "'We uphold a dismissal under Fed.R.Civ.P. 12(b)(6) only when it appears that the plaintiff[s] can prove no set of facts in support of the claims that would entitle [them] to relief, accepting all well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff[s].'" *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir.) (quoting *Fuller v. Norton*, 86 F.3d 1016, 1020 (10th Cir.1996)), *cert. denied*, — U.S. —, 118 S.Ct. 55, — L.Ed.2d — (1997). With this standard in mind, we turn to Plaintiffs' ADA claims.

Discussion

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training,

and other terms, conditions, and privileges of employment." [FN2] 42 U.S.C. S 12112(a). See *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir.1994) (quoting 42 U.S.C. S 12112(a)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. S 12111(8). *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir.1995) (quoting 42 U.S.C. S 12111(8)).

FN2. In this analysis, we rely on cases interpreting both the ADA and the Rehabilitation Act of 1973, 29 U.S.C. S 701 et seq., because the standards are largely the same. *See Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir.1997) (concluding "cases construing one statute are instructive in construing the other"); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 n. 2 (8th Cir.1995) ("cases interpreting either [ADA or Rehabilitation Act] will be instructive for this analysis" of the ADA); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir.1994) ("'Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA.'") (quoting 29 C.F.R. § 1630, App. 1630.2(g)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995).

To establish a claim under the ADA, Plaintiffs must demonstrate that: (1) they are disabled persons within the meaning of the ADA; (2) they are qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation (which they must describe); and (3) United discriminated against them in its employment decision (the job application procedure and/or hiring process) because of their alleged disability. See Siemon v. AT&T Corp., 117 F.3d 1173, 1175 (10th Cir.1997); White, 45 F.3d at 360-61.

Taking all Plaintiffs' allegations in their Amended Complaint as true, as we must, Plaintiffs have established they are "qualified" for the position of commercial airline pilot and that United refused to continue their interviews (or hire them) due to

their alleged disability, their uncorrected vision. Plaintiffs are both commercial airline pilots with regional commuter airlines; each holds an airline transport pilot license, which supersedes United's requirement for a commercial license; each has recorded thousands of hours of flight time as Pilot in Command; and each has a First-Class medical certificate from the Federal Aviation Administration (FAA). Additionally, United sent each plaintiff a letter confirming that her uncorrected vision, each plaintiff's alleged disability, disqualified her from employment as a United pilot. Thus, at issue in this case, is whether Plaintiffs' vision qualifies them as "individuals with a disability" within the meaning of the ADA.

The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The statutory requirement that disability determinations be made "with respect to the individual," contemplates an individualized, and case-by-case determination of whether a given impairment substantially limits a major life activity of the individual. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 166 (4th Cir.1997) (en banc) (citing *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir.1995) (collecting cases holding that a finding of disability must be made on a case-by-case basis)). *See also Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir.1996) (holding that "a determination of disability must be made on an individualized, case-by-case basis"); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir.1996) (same); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir.1996) (applying factors in an individualized manner).

Here, Plaintiffs allege they are "disabled" within the meaning of the subparagraphs (A) and (C) because their uncorrected vision is a physical impairment that substantially limits their major life activity of seeing and United regarded them as having a substantially limiting impairment when it disqualified them

from all airline pilot positions. We address each of Plaintiffs' contentions in turn.

I. 42 U.S.C. S 12102(2)(A)—Actual Disability

Subparagraph (A) defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual. › 42 U.S.C. S 12102(2)(A). Therefore, to qualify as having a "disability" pursuant to subparagraph (A), Plaintiffs must establish (1) that their vision is a "physical or mental impairment;" and (2) if their vision is an impairment, that it "substantially limits one or more of the[ir] major life activities." See *id.*

1. Physical or Mental Impairment

Plaintiffs must establish that their vision is a "physical or mental impairment." See id. The ADA does not define a "physical or mental impairment." Hence, we are confronted with a question of statutory interpretation. Our inquiry begins with an examination of the language of the statute itself. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir.1997). "'When the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances.'" *Id.*(quoting *United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir.1991), *cert. denied*, 503 U.S. 984, 112 S.Ct. 1667, 118 L.Ed.2d 388 (1992) (quotation omitted)). In addition, "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 2054, 124 L.Ed.2d 138 (1993). "[C]ommon and ordinary usage may be obtained by reference to a dictionary." *United States v. Roberts*, 88 F.3d 872, 877 (10th Cir.1996).

The term "impairment" is not defined by the statute. However, the statute does require that the impairment "substantially limit" a major life activity. See 42 U.S.C. § 12102(2)(A). Thus, the impairment must be significant, and not merely trivial. *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1417 (10th Cir.1992). *See also*

Runnebaum, 123 F.3d at 167 ("Because the impairment must impose a 'substantial limitation' on 'one or more of the major life activities,' the impairment must be significant, not merely trivial."); *Byrne v. Board of Educ., Sch. of West Allis-West Milwaukeep*, 979 F.2d 560, 564 (7th Cir.1992) ("The statute's inclusion of the limiting adjectives 'substantial' and 'major' emphasizes that the impairment must be a significant one."); *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir.1986) (concluding that "[t]he statutory language, requiring a substantial limitation of a major life activity, emphasizes that the impairment must be a significant one"). In addition, Webster's Dictionary defines "impair" as "to make worse by or as if by diminishing in some material respect." Webster's Ninth New Collegiate Dictionary 574 (1984). See also Black's Law Dictionary 677 (5th ed. 1981) ("To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner."); Ballentine's Law Dictionary 584 (3d ed. 1969) ("To make worse; to diminish in quality, value, excellence, or strength; to deteriorate.").

We are also guided by the definition promulgated by the EEOC in its regulations issued to implement Title 1 of the ADA. See 29 C.F.R. § 1630.1(a); 42 U.S.C. § 12116 (requiring the EEOC to issue regulations to implement Title 1 of the ADA). The regulations define a "physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, *899 digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

To further assist in the interpretation of the ADA, the EEOC published an Interpretive Guidance on Title I of the Americans with Disabilities Act. 29 C.F.R. § 1630, App. Under

the EEOC's Interpretative Guidance, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." [FN3] 29 C.F.R. § 1630, App. § 1630.2(h) para. 2.

FN3. It is well established that we must defer to the EEOC's regulatory definition unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). However, although we give great deference to the EEOC's interpretation of the ADA found in the regulations promulgated under the express authority of Congress and the ADA itself, we do not do the same for interpretative guidance promulgated under the Administrative Procedure Act. See *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir.1994) (no special deference due to Department of Labor comment, which is a "purely interpretive rule") (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301- 04, 99 S.Ct. 1705, 1717-19, 60 L.Ed.2d 208 (1979) (explaining distinction between interpretative rules and substantive or legislative rules)). Hence, while the EEOC's Interpretive Guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference under *Chevron*.

Accordingly, we must determine whether Plaintiffs' vision makes worse or diminishes in a material or significant respect any of the enumerated body systems. See 29 C.F.R. § 1630.2(h). We will evaluate Plaintiffs' vision in the uncorrected state, without the benefit of mitigating or corrective measures, because the EEOC's Interpretive Guidance is reasonable and consistent with the statutory mandates themselves. The fact that a disorder or condition may be mitigated or correctable does not affect the underlying nature of the disorder or condition. If the underlying disorder or condition makes worse or diminishes in a material respect any of the enumerated body systems of the individual, then it should be considered an "impairment," regardless of whether the individual compensates for this worsening or diminishment by corrective measures. *See Roth v. Lutheran Gen. Hosp.*,

57 F.3d 1446, 1454 (7th Cir.1995) (concluding impairment determination made without regard to mitigating measures).

In addition, "[i]t is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments." 29 C.F.R. § 1630, App. S 1630.2(h) para. 3. Hence, impairment does not include: physical characteristics such as eye color, hair color, left-handedness, height, weight, or muscle tone that are within the "normal" range and are not the result of a physiological disorder; characteristic predisposition to illness or disease; pregnancy; common personality traits such as poor judgment or quick temper where these are not the symptoms of a mental or psychological disorder; or environmental, cultural or economic disadvantages such as poverty, lack of education or a prison record. *Id. See Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir.1997) (holding physical characteristics of excessive weight and lack of cardio-respiratory endurance and strength not impairments under the ADA); *Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir.1989) (holding in Rehabilitation Act case that personality traits of "poor judgment, irresponsible behavior and poor impulse control" could be described as commonplace and "in no way r[ose] to the level of an impairment"); *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (C.D.Cal.1984) (finding body builder's "unique musculoskelital [sic] system and body composition" not an impairment because it is not the result of a "physiological disorder [ ]," "cosmetic disfigurement," or "anatomical loss"); *Trembczsynski v. City of Calumet City*, No. 87-C-0961, 1987 WL 16604 (N.D.Ill. Aug.31, 1987) ("Being slightly myopic [20/40 uncorrected vision] is a physical characteristic, not . . . an 'impairment' as contemplated by the [Rehabilitation] Act."). Compare *Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 23 (1st Cir.1993) (concluding "morbid obesity" may be physical impairment).

Plaintiffs averred that their uncorrected vision prevents them from engaging in normal everyday activities, such as, driving, watching television, and shopping. After careful consideration, we hold that Plaintiffs' averments are sufficient to establish that their uncorrected vision of 20/200, in the right eye, and 20/400, in the left eye, makes worse or diminishes the eyes, the special sense organ of sight, compared to a normal person with 20/20 vision. [FN4] Therefore, for the purposes of the motion to dismiss, Plaintiffs established their vision is a physical impairment within the meaning of the ADA.

FN4. It could be argued that by definition uncorrected vision of 20/200 and 20/400 makes worse or diminishes in a material respect the eyes on any individual creating a per se impairment. However, we do not espouse or endorse any per se impairments or disabilities. As noted supra, the ADA's use of individualized language requires courts to make case-by-case impairment and disability determinations. *See Runnebaum*, 123 F.3d at 169 (determination of whether individual with asymptomatic HIV is impaired or disabled must be made on individualized case-by-case basis).

2. "Substantially Limits" A "Major Life Activity"

Plaintiffs must also establish that their physical impairment, their vision, "substantially limits one or more of the[ir] major life activities." See 42 U.S.C. § 12102(2)(A). The ADA does not define either "substantially limits" or "major life activity." Therefore, we are again confronted with questions of statutory interpretation. We begin our analysis with the term "major life activity." While the statute itself does not define a "major life activity," the ADA regulations adopt the definition found in the Rehabilitation Act regulations, 34 C.F.R. § 104. *Bolton*, 36 F.3d at 942. As defined, a "major life activity" includes, but is not limited to, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). See *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1444 (10th Cir.1996) (adopting regulation's definition of "major life activities") (quoting 29 C.F.R. § 1630.2(i)); *Lowe*, 87 F.3d at 1173 (including sitting, standing, lifting and reaching from 29 C.F.R. § 1630, App. § 1630.2(i)).

In their Amended Complaint, Plaintiffs alleged they are substantially limited in the major life activity of seeing. Inasmuch as seeing is expressly included in the EEOC's definition of major life activities, which has been previously adopted by this court, we do not decide what other activities may qualify and we now turn to consider whether Plaintiffs' physical impairment "substantially limits" their major life activity of seeing.

Pursuant to the ADA regulations, in order for a physical or mental impairment to be "substantially limiting," the individual must be:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or

duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

In determining whether an individual is substantially limited in a major life activity, the following three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. S 1630.2(j)(2). See *MacDonald*, 94 F.3d at 1444 (quoting 29 C.F.R. S 1630.2(j)(2)); *Lowe*, 87 F.3d at 1173 (same); *Bolton*, 36 F.3d at 943 (same).

Thus, in order to establish that they are substantially limited in the major life activity of seeing, Plaintiffs must establish that they are unable to see or are significantly restricted as to the condition, manner, or duration of their ability to see as compared to the average person in the general population, taking into consideration the three listed factors. See 29 C.F.R. § 1630.2(j)(1)(i) and (ii). Plaintiffs have made no allegations that they are blind or unable to see. [FN5] Hence, we are concerned with Plaintiffs' vision as compared to the vision of the average person in the general population.

FN5. Plaintiffs point out in their Amended Complaint that "corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification." However, this standard applies to corrected vision not uncorrected vision. Plaintiffs' corrected visual acuity is acknowledged to be "20/20 or better." Hence, any implication that they are "legally blind" is without merit.

There is no dispute that Plaintiffs' vision impairment is permanent and results in the reliance on corrective measures, eye glasses or contact lenses, in order to carry out normal daily activities. [FN6] However, Plaintiffs argue that we must evaluate their vision impairment without respect to these mitigating measures. Plaintiffs rely on the EEOC's Interpretive Guidance

for § 1630.2(j), which provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630, App. § 1630.2(j)(2) para. 8. Accordingly, Plaintiffs argue that they are disabled because their uncorrected vision substantially limits their major life activity of seeing.

FN6. On appeal, we do not consider the effects, if any, that eye surgery, such as radial keratotomy, may have on the permanency or long term impact of Plaintiffs' vision. However, we are mindful that as technology advances so must our consideration of these questions.

United responds that the EEOC's Interpretive Guidance is in direct conflict with the statutory language requiring that the physical or mental impairment "substantially limit" a major life activity. United argues that to evaluate whether an individual has an impairment without regard to mitigating or corrective measures effectively reads out the statutory requirement that the impairment be "substantially" limiting. United reasons that the determination of whether Plaintiffs are "disabled" must be made taking into consideration any mitigating or corrective measures utilized by Plaintiffs.

Therefore, the crucial determination becomes whether the EEOC's Interpretive Guidance is correct that disability inquiries should be made without regard to mitigating or corrective measures or is in conflict with the statutory mandate that the impairment "substantially limit" a major life activity. The courts that have considered this issue are split. While some courts have expressly or implicitly followed the EEOC's guidance, [FN7] others have expressly or implicitly rejected the EEOC's guidance as being in direct conflict with the statutory language requiring a "substantial" limitation. [FN8]

FN7. *See Doane v. City of Omaha,* 115 F.3d 624, 627 (8th Cir.1997) (stating "analysis of whether [plaintiff] is disabled does

not include consideration of mitigating measures"); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir.1996) (holding EEOC's interpretation is consistent with the ADA's legislative history, thus, an individual's disability must be assessed without regard to mitigating measures); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir.1996) (stating determination made without regard to mitigating measures without discussion or application), *cert. denied*, — U.S. —, 117 S.Ct. 1349, 137 L.Ed.2d 506 (1997); *Fallacaro v. Richardson*, 965 F.Supp. 87, 93 (D.D.C.1997) ("This Court finds that the EEOC's no mitigating measures' interpretation is eminently reasonable, consistent with the language and purpose of the Rehabilitation Act, and supported by the legislative history of the ADA."); *Wilson v. Pennsylvania State Police Dep't,* 964 F.Supp. 898, 902-907 (E.D.Pa.1997) (expressly adopting EEOC guidance); *Sarsycki v. United Parcel Serv.*, 862 F.Supp. 336, 340 (W.D.Okla.1994) (relying on EEOC interpretation as authoritative without discussion).

FN8. *See Gilday v. Mecosta County,* 124 F.3d 760, 767-68 (6th Cir.1997) (holding EEOC's interpretive guidance in conflict with statutory language and disability determinations should be made taking into consideration any mitigating measures) (2-1 decision); *Cline v. Fort Howard Corp.*, 963 F.Supp. 1075, 1081 n. 6 (E.D.Okla.1997) (recognizing split of authority and determining that "the better reasoned approach in the context of vision is one which evaluates the limitation with regard to the use and effectiveness of corrective devises"); *Gaddy v. Four B Corp.*, 953 F.Supp. 331, 337 (D.Kan.1997) ("EEOC Interpretive Guideline § 1630.2(j)'s pre-medicated perspective is in direct conflict with the ADA's express statutory language . . . "); *Moore v. City of Overland Park*, 950 F.Supp. 1081, 1088 (D.Kan.1996) (same); *Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 881 (D.Kan.1996) (rejecting "without" portion of § 1630.2(j) because "plain language of the ADA conflicts with the EEOC's Interpretive Guidance"); *Schluter v. Industrial Coils, Inc.*, 928 F.Supp. 1437, 1445 (W.D.Wis.1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires

plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); *Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 813 (N.D.Texas 1994) (concluding "EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation"); *See also Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-192 n. 3 (5th Cir.1996) (noting that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity"); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir.1993) ("[A] person is not handicapped if his vision can be corrected to 20/200."), *cert. denied*, 511 U.S. 1011, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994); *Sweet v. Electronic Data Sys., Inc.*, No. 95-Civ.-3987, 1996 WL 204471, at *5 (S.D.N.Y.1996) (visual impairment of 20/20 in one eye and correctable to 20/80 in other eye does not qualify as a "disability" because it does not substantially limit ability to participate in any major life activity); *Deckert v. City of Ulysses*, No. 93-1295, 1995 WL 580074 (D.Kan. Sept. 6, 1995) (rejecting EEOC interpretation), aff'd on other grounds, > 105 F.3d 669 (Table) (10th Cir.1996).

We join those courts which have rejected this portion of § 1630.2(j) of the EEOC's Interpretive Guidance. We hold that this portion of the EEOC's Interpretive Guidance is in direct conflict with the plain language of the ADA. The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual. In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.

This portion of the EEOC's Interpretive Guidance is not only in direct conflict with the statute, but is also internally inconsistent with other portions. In discussing "substantially

limit" generally, the Interpretive Guidance states: Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . .

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease-or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. 29 C.F.R. § 1630, App. § 1630.2(j) para 1-2 (emphasis added). Thus, the EEOC recognized it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA.

Furthermore, in discussing whether an individual is disabled under the "regarded as" prong of the ADA, 42 U.S.C. § 12102(2)(C), because the employer "regards" the individual as having a substantially limiting impairment when in fact the individual's impairment is not substantially limiting, the Interpretive Guidance uses the example of "an employee [who] has controlled high blood pressure that is not substantially limiting." *Id.* at § 1630.2(l) para. 6 (emphasis added). Under this example, the employee is not actually disabled because in the controlled state the impairment does not "substantially limit" a major life activity. The employee's controlled high blood pressure does not affect, in fact, the ability to perform a major life activity.

Accordingly, to state a prima facie case and survive United's motion to dismiss, Plaintiffs' vision in its corrected state must "substantially limit" their major life activity of seeing. Plaintiffs cannot make this showing. It is undisputed that Plaintiffs' corrected vision is "20/20 or better." Thus, while Plaintiffs'

uncorrected vision would undoubtedly "*903 substantially limit" their major life activity of seeing, this is a hypothetical situation. In fact, Plaintiffs do not limit their normal daily activities to those that could be performed with their uncorrected vision. Plaintiffs admit that with their corrective measures they "function identically to individuals without a similar impairment." Plaintiffs merely don their eye glasses (or contact lenses) and go about all their normal daily activities in the same or similar condition, manner, or duration as the average person in the general population. Hence, Plaintiffs can prove no set of facts upon which relief may be granted on this claim. Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major live activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing. *See Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 878 (D.Kan.1996) (defendant "is trying to have it both ways" by claiming he is disabled due to high blood pressure, but that it is controlled sufficiently that he can perform the job).

II. 42 U.S.C. S 12102(2)(C)—Regarded As Disabled

Subparagraph (C) defines a "disability," as "being regarded as having" a physical or mental impairment that substantially limits one or more of the major life activities of the individual. 42 U.S.C. § 12102(2)(C). The regulations provide three ways an individual is "regarded as" being disabled: (1) the individual: "[h]as a physical or mental impairment that does not substantially limit major life activities but is treated . . . as constituting such limitation;" (2) the individual "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;" or (3) the individual "[h]as none of the impairments defined in [29 C.F.R. § 1630.2(h)(1) and (2)] but is treated . . . as having a substantially limiting impairment." 29 C.F.R. § 1630.2(l)(1)-(3). *See MacDonald*, 94 F.3d at 1444 (quoting and adopting 29 C.F.R.

§ 1630.2(l)). "Thus, [a] person is regarded as having 'an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment,' " regardless of whether the individual actually has an impairment. MacDonald, 94 F.3d at 1444 (quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir.1995) (citation omitted)). The focus is on the impairment's or the perceived impairment's effect upon the attitudes of others. *Id. See Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 913 (11th Cir.1996).

In this case, Plaintiffs contend United "regards" them as disabled in the major life activity of working. [FN9] Plaintiffs assert that United perceives them as unfit to work as global airline pilots because: (a) United's policy is not limited to certain pilot positions, aircraft, or routes but encompasses all pilot positions; (b) United presumed without substantiation that they cannot perform the functions of the job; and (c) United disqualified them based on "myth, fear or stereotype" that individuals with uncorrected vision of worse than 20/100 constitute a safety hazard. In addition, Plaintiffs argue that other global airlines have similar or higher uncorrected vision standards than United, thus blocking Plaintiffs from seeking the same class of employment elsewhere in the industry.

FN9. In their Opening Brief, Plaintiffs assert that "United regards [them] as substantially impaired in the major life activity of seeing, working, or both." (Plaintiffs-Appellants' Opening Brief at 15). However, in their Amended Complaint, Plaintiffs' claim is limited to whether United regards them as substantially limited in the major life activity of working. (Plaintiffs-Appellants' Appendix at 9-10). In reviewing the grant of a motion to dismiss, we are concerned only as to whether Plaintiffs' complaint states a claim upon which relief may be granted. *Yoder*, 104 F.3d at 1224. Therefore, we consider only the claim found in Plaintiffs' Amended Complaint, i.e., whether United regards Plaintiffs as substantially limited in the major life activity of working.

United responds that it did not regard them as disabled. United argues that it did not regard Plaintiffs as substantially limited in the major life activity of working because its requirement did not preclude Plaintiffs from a "class of job." United contends that *904 Plaintiffs merely "fail[ed] to meet the rational job-related safety requirements of the positions they s [ought]."

An employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that individual is incapable of performing a particular job. The statutory requirement that the employer regard the employee as having a substantially limiting impairment indicates that the an employer regards an employee as substantially limited in the ability to work when the employer regards the employee's impairment or perceived impairment as foreclosing generally the type of employment involved. *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir.1997). *See Hileman v. City of Dallas, Tex.*, 115 F.3d 352, 354 (5th Cir.1997) ("An impairment must substantially limit employment in general, not merely the particular job that the plaintiff may wish to hold.").

In order "[t]o demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show significant[ ] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" *Bolton*, 36 F.3d at 942 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). *See MacDonald*, 94 F.3d at 1444 (quoting *Bolton*). A "class of jobs" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). *See Siemon*, 117 F.3d at 1176 (quoting 29 C.F.R. § 1630.2(j)(3)(ii)(B)); *MacDonald*, 94 F.3d at 1444-45 (same). A "broad range of jobs in various classes" is

defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(ii)(C). *See Siemon*, 117 F.3d at 1176 (quoting 29 C.F.R. § 1630.2(j)(3)(ii)(C)); *MacDonald*, 94 F.3d at 1445 (same). However, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). *See Siemon*, 117 F.3d at 1176 (quoting 29 C.F.R. § 1630.2(j)(3)(i)); *MacDonald*, 94 F.3d at 1445 ("If neither of these definitions is met, and an individual instead shows only that he is unable 'to perform a single, particular job,' . . . the regulations and case law make clear that he has not shown that he is substantial[ly] limit[ed] in the major life activity of working.'"); *Wooten*, 58 F.3d at 386 (holding that under the ADA, "'working' does not mean working at a particular job of that person's choice"); *Bolton*, 36 F.3d at 942 (quoting 29 C.F.R. § 1630.2(j)(3)(i)); *Welsh*, 977 F.2d at 1419 (holding that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act").

Therefore, in order to establish a disability under the "regarded as" prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes. In this case, we are concerned with whether Plaintiffs can present any set of facts based on their Amended Complaint establishing that United treated Plaintiffs as having a substantially limiting impairment. To do so, Plaintiffs must establish United's disqualification of them from all pilot positions as a significant restriction on their ability to perform a class of jobs. [FN10] *See Foreman*, 117 F.3d at 806 ("the question is whether Foreman was treated by [defendants] as having an impairment that substantially limits a major life activity"); *MacDonald*, 94 F.3d at 1445 (concluding that to establish a disability plaintiff must show

defendant regarded him as being substantially limited in performing a class of jobs). We hold that Plaintiffs cannot make this showing. Taking all Plaintiffs' allegations as true, Plaintiffs can establish only that their physical impairment, their uncorrected vision, prevents them from working for United as a pilot; a single, particular job. They cannot show disqualification from a "class of jobs."

FN10. At oral argument, United stated that Plaintiffs were not disqualified from its non-passenger pilot positions. However, for the purposes of this appeal, we will assume Plaintiffs were disqualified from "all pilot positions" as they alleged in their Amended Complaint.

We are concerned with whether United regards Plaintiffs as "disabled," not whether the airline industry as a whole regards individuals with uncorrected vision of 20/100 or worse as "substantially limited" in a major life activity. It is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters. *See Cook*, 10 F.3d at 25-26 (using example demonstrating focus is on employer in question not other employers in the industry). However, we do examine the airline industry to assist in determining whether Plaintiffs' impairment substantially limits their employment generally in a "class of jobs."

The "class of jobs" Plaintiffs argue United disqualifies them from is that of "global airline pilot." However, this description is too narrow to constitute "class of jobs." A "class of jobs" consists of jobs that utilize "similar training, knowledge, skills or abilities." 29 C.F.R. § 1630, App. § 1630.2(j)(3)(ii)(B). As Plaintiffs' point out in their Amended Complaint, "[t]here is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines." (Plaintiffs-Appellants' Appendix at 10, P 38(g)). Thus, the "class of jobs" to which Plaintiffs must compare themselves is that of all pilot positions at all airlines, because they all require the same or similar training, knowledge, skills, or abilities. This class would include, but not

be limited to, all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines. *See e.g. McKay v. Toyota Motor Mfg.*, U.S.A., Inc., 110 F.3d 369, 373 (6th Cir.1997) (class of jobs at issue included all manufacturing jobs not only narrow range of assembly line manufacturing jobs requiring repetitive motion or frequent lifting of more than ten pounds); *MacDonald*, 94 F.3d at 1445 ("[T]axiing aircraft is neither 'a class of jobs,' nor 'a broad range of jobs in various classes,' but is instead 'a single, particular job.'"); *Wooten*, 58 F.3d at 386 (concluding plaintiffs' carpal tunnel syndrome "prevent[ed] him from performing a narrow range of meatpacking jobs"); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir.1995) (arm impairment did not prevent plaintiff from working in entire class of welding jobs, only those requiring substantial climbing); *Welsh*, 977 F.2d at 1419 ("an impairment that an employer perceives as limiting an individual's ability to perform only one job [firefighter] is not a handicap").

For example, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. § 1630, App. § 1630.2(j) para. 15. With this example, the EEOC illustrates an individual who is "not substantially limited in the ability to perform any other major life activity and, with regard to working, [is] only unable to perform either a particular specialized job or a narrow range of jobs." *Id. See Bolton*, 36 F.3d at 942 (quoting 29 C.F.R. § 1630.2(j)(3)(i) and *Welsh*); *Welsh*, 977 F.2d at 1419 (inability "to perform only one job is not a handicap under the [Rehabilitation] Act"); *Daley*, 892 F.2d at 215 ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."); *Forrisi*, 794 F.2d at 934 ("an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job"); *Tudyman*, 608 F.Supp. at 746 (concluding "refusal to hire someone for a single job does not in and of itself constitute perceiving the [person] as a handicapped individual").

Adopting Plaintiffs' reasoning would imply that anyone who failed to obtain a single job because of a single requirement of employment would become a "disabled" individual because the employer would thus be regarding the applicant's failure as substantially limiting in the major life activity of working. *Forrisi,* 794 F.2d at 935. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir.1996) (stating that "otherwise . . . anyone[ ] could establish a prima facie discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in [a protected] group"). This reading would stand the Act on its head. This provision of the ADA seeks to remedy perceived disabilities that, like actual disabilities, extend beyond the isolated mismatch of employer and employee. We agree with the court's sentiments expressed in > Hileman, "[w]e refuse to construe the . . . Act as a handout to those who are in fact capable of working in substantially similar jobs . . . " *Hileman,* 115 F.3d at 354 (discussing Rehabilitation Act).

Finally, we note that while the FAA may not believe there is a safety concern regarding pilots with uncorrected vision of 20/100 or worse, that alone does not prevent United from presenting evidence to the contrary, were it necessary to refute a prima facie case of discrimination. As long as United does not practice illegal discrimination, we discern no reason why United cannot maintain a higher standard for safety than the FAA. It must be remembered that the FAA sets the minimum criteria for a pilot's license, not the maximum. Conclusion

We hold that Plaintiffs' Amended Complaint alleged sufficient facts to support a conclusion that their uncorrected vision constituted a physical impairment under the ADA. However, for the foregoing reasons, we hold that Plaintiffs cannot present any set of facts showing their vision, when viewed with mitigating and corrective measures, substantially limits the major life activity of seeing. Nor can Plaintiffs show United regarded them as substantially limited in a major life activity of working by finding Plaintiffs unfit for its commercial pilot positions. Therefore, we

affirm the district court's dismissal of Plaintiffs' ADA claims for failure to state a claim upon which relief may be granted.

AFFIRMED.

United States Court of Appeals for the Tenth Circuit

KAREN SUTTON AND KIMBERLY HINTON,

Plaintiffs-Appellants,

v.

UNITED AIR LINES, INC.,

Defendant-Appellee.

Case No. 96-1481.

ORDER

Filed March 3, 1998.

Before BRORBY, BARRETT, AND MCKAY,

Circuit Judges.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of the Court

by: _____
Deputy Clerk

KAREN SUTTON AND KIMBERLY HINTON,

Plaintiffs,

v.

UNITED AIRLINES, INC.,

Defendant.

Civ. A. No. 96-S-121.
United States District Court, D. Colorado.
Aug. 28, 1996.

Tucker K. Trautman, Shawn D. Mitchell, Ireland, Stapleton, Pryer & Pascoe, P.C., Denver, for Plaintiffs.

Lisa Hogan, Brownstein Hyatt Farber & Strickland, P.C., Denver, for Defendant.

MEMORANDUM OPINION AND ORDER

SPARR, District Judge.

THIS MATTER comes before the court on the Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) (filed February 29, 1996). The court has reviewed the motion, the Plaintiffs' opposition (filed April 8, 1996), the Defendant's reply (filed May 1, 1996), the Amended Complaint (filed July 18, 1996), and the applicable law and is fully advised in the premises.

1. Standard of Review

In reviewing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a district court's role is to assess the legal feasibility of the complaint; it is not to weigh the evidence which might be offered at trial. In considering the legal feasibility of the complaint, a court may only consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters of which judicial notice may be taken. *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir.1993). Applying Fed.R.Civ.P. 12(b)(6), a court should not dismiss a

cause of action for failure to state a claim unless the court determines that the plaintiff can prove no set of facts that would entitle it to relief, even when all well- pleaded allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528-29 (10th Cir.1992); *Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n.*, 908 F.2d 578, 582 (10th Cir.1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1148 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). So long as the plaintiff can offer evidence in support of a legally recognized claim for relief, a motion to dismiss must be denied. *Hiatt v. Schreiber*, 599 F.Supp. 1142, 1145 (D.Colo.1984).

2. The Plaintiffs' Claim

The Plaintiffs' Amended Complaint alleges a single claim for violation of the Americans with Disabilities Act, 42 U.S.C. S 12101 et seq., ("the ADA"). Plaintiffs are twin sisters who are currently employed as commercial airline pilots. Plaintiffs have applied to Defendant United for employment as passenger airline pilots, but have been rejected for such employment because they do not meet United's minimum uncorrected vision requirements. United requires its passenger airline pilots to have uncorrected vision of 20/100 or better. Each Plaintiff has uncorrected vision of 20/200 or worse in her right eye and 20/400 or worse in her left eye. [FN1] Plaintiffs claim that they are qualified for the positions for which they applied because, with corrective lenses, they have vision that is 20/20 or better. Plaintiffs allege United is violating the ADA by rejecting them on the basis of a disability or because United regards them as having a disability.

FN1. A person with visual acuity of 20/200 can see an object from 20 feet only as well as an unimpaired person can see the same object from 200 feet. If the visual acuity is 20/400, then the impaired individual standing 20 feet away sees the same image as the unimpaired person sees from 400 feet. Corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification. (Amended Complaint paragraphs 37. b. and c.)

3. Statutory Framework

The ADA forbids discrimination: against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a) (1996). In order to state a claim under the ADA, a plaintiff must establish: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability. *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1123 (10th Cir.1995), quoting *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir.1995). [FN2]

FN2. The language adopted in the ADA tracks that of the Rehabilitation Act of 1973, 29 U.S.C. S 701 et seq. The ADA expressly requires its provisions to be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements" under the two statutes. 42 U.S.C. S 12117(b). Congress intended relevant caselaw developed under the Rehabilitation Act to be generally applicable to analogous inquiries under the ADA. *White*, 45 F.3d at 360; *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 942-43 (10th Cir.1994), *cert. denied*, 115 S.Ct. 1104 (1995); House Report No. 101-485(I) p. 50, reprinted in 1990 U.S.C.C.A.N. 332.

The court must begin by determining whether Plaintiffs are disabled as defined by the ADA. The ADA defines "disability" using three alternatives:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment. 42 U.S.C. § 12102(2) (1996). *See also Bolton*, 36 F.3d at 942. Plaintiffs argue that they are disabled and additionally that

United regarded them as being disabled. United argues that the Plaintiffs are not disabled because they have no impairment which substantially limits any major life activities. Plaintiffs claim they are, and United regards them as being, substantially limited in the major life activity of seeing (Amended Complaint paragraphs 37, 38; Plaintiffs' opposition brief pp. 2, 3, 6 n. 2, 12).

Although the ADA does not define "physical impairment," "substantially limits," "major life activities," or "being regarded as having such an impairment," the regulations promulgated by the Equal Employment Opportunity Commission (EEOC) pursuant to the ADA provide significant guidance. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190 (5th Cir.1996) (citation omitted). The regulations define "physical impairment" to include:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; . . .

29 C.F.R. § 1630.2(h)(1) (1996).

> "Major life activities" means:
>
> functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i). The appendix to the regulations provides that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. Pt. 1630, Appendix to Part 1630—Interpretive Guidance to Title I of the ADA, § 1630.2(i) (1996).

> The term "substantially limited" means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or

> (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Whether an individual is substantially limited in a major life activity is determined in light of:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

> "Being regarded as having such an impairment means:
>
> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward impairment; or
>
> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having substantially limiting impairment.

29 C.F.R. § 1630.2(l).

4. Analysis

The issue is whether the Plaintiffs' impairment substantially limits any of their major life activities or whether United regards the Plaintiffs as having such an impairment, such that they are disabled as defined by the ADA. The court must consider the extent to which their impairment restricts their specific activities.

EEOC Compliance Manual § 902.4(a) (1995). Obviously, the Plaintiffs' ability to see without correction is affected, but, as reflected in the statute and regulations, far more is required to trigger coverage under 42 U.S.C. § 12102(2)(A) and (C).

First, Plaintiffs do not claim any restrictions on their activities other than their inability to obtain employment as passenger airline pilots for United. Plaintiffs do not allege that they have any medical restrictions. Plaintiffs do not allege any activity that they are unable to perform that the average person in the general population can perform, nor do they state that they suffer from any significant restrictions in any activities as compared to the average person. See 29 C.F.R. § 1630.2(l)(i) and (ii). Indeed, they are currently employed as commercial airline pilots. Plaintiffs concede that, with their corrective lenses, they are able to function identically to individuals without a similar impairment. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors in 29 C.F.R. § 1630.2(j)(2), does not amount to a significant restriction when compared with the abilities of the average person. 29 C.F.R. Pt. 1630 App. § 1630.2(j).

Second, numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities. *Roth v. Lutheran Gen'l Hosp.*, 57 F.3d 1446, 1454-56 (7th Cir.1995) (doctor with strabismus (crossed eyes) was not disabled because he could read, write, lecture, and successfully complete graduate school); *Chandler v. City of Dallas,* 2 F.3d 1385, 1390 (5th Cir.), *reh'g denied*, 9 F.3d 105 (1993), cert. denied, 114 S.Ct. 1386 (1994) (vision correctable to 20/200 is not a "handicap" under the Rehabilitation Act); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248-50 (6th Cir.1985) (plaintiff with crossed eyes who had difficulty operating mail-sorting machine but who otherwise was not limited in work or recreation was not "handicapped" under the Rehabilitation Act); *Venclauskas v. Connecticut Dept. of Pub. Safety*, 921 F.Supp. 78, 80-82 (D.Conn.1995) (applicant for state police trooper trainee who was rejected for failure to meet unaided visual acuity

standard failed to state a claim under the ADA or the Rehabilitation Act); *Joyce v. Suffolk County,* 911 F.Supp. 92, 96 (E.D.New York 1996) (candidate for county police officer position who failed to meet visual acuity standard because his uncorrected vision in each eye was 20/200 but his corrected vision in each eye was 20/20 was not "handicapped" or "disabled" under the ADA or the Rehabilitation Act); *Walker v. Aberdeen-Monroe County Hosp.,* 838 F.Supp. 285, 288 (N.D.Miss.1993) (a person whose vision is corrected to 20/30 is not "handicapped" within the meaning of the Rehabilitation Act); *Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, 5 A.D.Cases 853 (S.D.N.Y. April 26, 1996) (plaintiff's diminished vision in one eye did not qualify as a "disability" because it did not substantially limit his ability to participate in any major life activity). Even accepting all of the Plaintiffs' allegations as true, Plaintiffs have not stated a claim that they are substantially limited in the major life activity of seeing.

Third, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working. EEOC Compliance Manual § 902.4(c). With respect to the major life activity of working, the term "substantially limits" means:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3) (1996) (emphasis added). The major life activity of working does not necessarily mean working at the job

of one's choice. *Bolton*, 36 F.3d at 942, citing *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir.1992); *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088, 1099 (D.Hawaii 1980). In addition to the factors listed in 29 C.F.R. § 1630.2(j)(2), the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working:"

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii) (1996).

The Plaintiffs' entire complaint is based on their inability to obtain the single, particular job of passenger airline pilot with United. Plaintiffs are currently employed as commercial airline pilots, jobs that utilize training, knowledge, skills, and abilities similar to the job of passenger airline pilot. Under the statutory factors to be considered by the court, it is clear that the Plaintiffs cannot state a claim that they are substantially limited in the major life activity of working. The Plaintiffs' common moderate vision impairment, although certainly an undesirable inconvenience, does not substantially limit their ability to work within the meaning of the ADA.

Plaintiffs argue that the ADA regulations require that the existence of a disability be determined without regard to the effects of mitigating measures such as drugs or prosthesis, citing 29 C.F.R. Pt. 1630, App. § 1630.2(h). The court recognizes that App. § 1630.2(j) provides that "[the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630, App. § 1630.2(j); EEOC Compliance Manual § 902.4(c)(1). However, the part of the EEOC's interpretation of the regulations that Plaintiffs rely upon addresses impairment, not disability, stating that the existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. Even if the Plaintiffs' uncorrected vision would be considered an impairment, a physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA because the statute requires an impairment that substantially limits one or more of the major life activities. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir.1995). If the impairment does not significantly restrict a major life activity, then the impairment is not a disability. EEOC Compliance Manual § 902.4(c)(1).

Fourth, it is apparent that the ADA was intended to protect only a limited class of persons; specifically, individuals who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir.1986); *Buko v. American Medical Laboratories, Inc.*, 830 F.Supp. 899, 904 (E.D.Va.1993), *aff'd*, 28 F.3d 1208 (4th Cir.1994). An excerpt from the legislative history of the ADA reveals that the type of visual impairment contemplated by the legislation is of a degree beyond that correctable by eyeglasses or contact lenses:

> For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [sic] visual aids,

braille devices, talking calculators, magnifiers, audio recordings and brailled material.

House Report No. 101-485(II) p. 64, reprinted in 1990 U.S.C.C.A.N. 346. To adopt a definition of "disabled" that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA. Millions of Americans suffer visual impairments no less serious than those of the Plaintiffs. Under such an expansive reading, the term "disabled" would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect.

Fifth, Plaintiffs cannot state a claim that United "regarded" them as being disabled. There is no support for the allegation that United, based on stereotype, myth, or unsubstantiated fears, regarded Plaintiffs as substantially impaired in the major life activity of seeing. As for the major life activity of working, the proper test for a "regarded as" claim is whether the impairment, as perceived, would affect the individual's ability to find work across the spectrum of same or similar jobs. *Muller v. Automobile Club of Southern California*, 897 F.Supp. 1289, 1297 (S.D.Calif.1995) (citation omitted); *Venclauskas*, 1995 WL 819137 at *3-4 (citations omitted). An employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 933-34. An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on the employee's ability to work in general. *Hutchinson v. United Parcel Service, Inc.*, 883 F.Supp. 379, 396 (N.D.Iowa 1995). The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of

employment involved. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 934; EEOC Compliance Manual § 902.8(f).

At most, the Plaintiffs can establish that United regarded them as unable to satisfy the requirements of a particular passenger airline pilot position. The Plaintiffs have had no difficulty obtaining other jobs in their field prior to this one. Plaintiffs are currently employed as commercial airline pilots. The need for corrective eyewear in no way substantially limits the Plaintiffs' employment generally. *Joyce*, 911 F.Supp. at 96.

Finally, the Plaintiffs indicate that United's visual acuity standards are based on its "misunderstanding" of certain government regulations. However, the ADA does not require United to lower or effect substantial modifications of its standards to accommodate disabled persons. *See Southeastern Community College v. Davis*, 442 U.S. 397, 413-14 (1979). Even if the Plaintiffs were disabled within the meaning of the statute, the ADA does not authorize the court to compel the airlines to alter the qualifications for passenger airline pilots.

The court concludes that the Plaintiffs cannot state a claim that United regarded them as impaired in a way that substantially limits a major life activity and, therefore, cannot state a claim that they are disabled under the ADA.

5. Conclusion

Even after accepting all factual allegations as true and drawing all reasonable inferences in favor of the Plaintiffs, the court concludes that the Plaintiffs cannot state a claim under the ADA. Plaintiffs do not support their claim with facts that would prove that they are disabled under the ADA, and therefore, that they are entitled to any relief under the ADA.

Accordingly, IT IS ORDERED:

1. The Defendant's Motion to Dismiss is GRANTED.

2. This civil action is DISMISSED.

3. Upon the filing of a bill of costs with the Clerk of the Court, the Defendant shall be entitled to recover from the Plaintiffs its costs in this action.

Supreme Court, U.S.
FILED
JUL 20 19
OFFICE OF THE CLERK

No. 97-1943

In The

Supreme Court of the United States

October Term, 1997

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

vs.

UNITED AIR LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
BROWNSTEIN HYATT FARBER
& STRICKLAND, P.C.
Attorneys for Respondent
410 Seventeenth Street
22nd Floor
Denver, Colorado 80202
(303) 534-6335

147476

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Is nearsightedness, a minor and commonplace condition totally correctable by the mere use of glasses or contacts, a disability under the Americans with Disabilities Act?

2. Did the Tenth Circuit give appropriate consideration to the Equal Employment Opportunity Commission's interpretive rule that requires disabilities be determined without regard to mitigating measures when the mitigating measures in question are eyeglasses and contacts?

3. Is a person regarded as disabled when she is treated as disqualified from performing only the job of global airline pilot?

CORPORATE LISTING PURSUANT TO SUPREME COURT RULE 29.6

Respondent United Air Lines, Inc. has a parent corporation named UAL Corporation, but does not have any nonwholly owned subsidiaries to report pursuant to Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Listing Pursuant to Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Reasons for Denying the Writ	1
I. The Tenth Circuit's Decision Does Not Create An Inter-Circuit Conflict.	1
A. The Tenth Circuit's Decision That Poor Vision Correctable by Eyeglasses is Not a Disability is in Accord with Every Other Circuit Court Which Has Considered This Issue.	1
B. The Tenth Circuit Correctly Decided This Issue.	3
C. This Case Does Not Provide the Best Vehicle for Resolving the Subsidiary Issue of Whether Disabilities Should be Determined Without Regard To Mitigating Measures.	5
II. The Tenth Circuit Gave Appropriate Consideration To The EEOC's Interpretive	

Contents

	Page
Guidance On Mitigating Measures Under Applicable Supreme Court Law.	8
III. The Tenth Circuit Correctly Applied The Law In Concluding That Petitioners Could Present No Set Of Facts Based On Their Amended Complaint Establishing That United Regarded Them As Disabled.	10
Conclusion	16

TABLE OF CITATIONS

Cased Cited:

Arnold v. United Parcel Service, Inc., 136 F.3d 854 (1998)	2, 6, 7
Baert v. Euclid Beverage Limited, No. 97-1474, 1998 U.S. App. LEXIS 15293, at *6-7 (7th Cir. July 10, 1998)	8
Bragdon v. Abbott, No. 97-156, 1998 U.S. LEXIS 4212, at *14 (June 25, 1998)	2, 9
Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996), *cert denied*, 117 S. Ct. 770 (1997)	15
Byrne v. Board of Educ., Sch. Dist. Of West Allis, 979 F.2d 560 (7th Cir. 1992)	11

Contents

	Page
Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994)	1
Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	9
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	9
Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667 (7th Cir. 1998)	3
Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998)	1
Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (Feb. 23, 1998)	12
Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997)	6
Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996)	7
Kirkingburg v. Albertson's, Inc., No. 96-35002, 1998 U.S. App. LEXIS 9439 (9th Cir. May 11, 1998) ..	1
Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3rd Cir. 1997	7
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)	9

Contents

	Page
Miller v. City of Springfield, No. 97-3268, 1998 U.S. App. LEXIS 13385, at *4 (8th Cir. April 17, 1998)	12
Pritchard v. Southern Co. Servs., 92 F.3d 1130, 1133 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997)	12
Public Employees Retirement System v. Betts, 492 U.S. 158 (1989)	10
Roth v. Lutheran General Hosp., 57 F.3d 1446 (1995)	2
Witter v. Delta Air Lines, Inc., 138 F.3d 1366 (11th Cir. 1998)	14, 15
Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995)	11
Wright v. City of Tampa, No. 97-408-CIV-T-17F, 1998 U.S. Dist. LEXIS 4338, at *2 (M.D. Fla. March 26, 1998)	8
Statutes Cited:	
42 U.S.C. §§ 12101-12213	1
42 U.S.C. § 12101(7)	3
42 U.S.C. § 12102(1)(B)	4

Contents

	Page
42 U.S.C. § 12102(2)	13
42 U.S.C. § 12102(2)(A)	4
42 U.S.C. § 12102(2)(C)	11
Rules Cited:	
Supreme Court Rule 10	11
Supreme Court Rule 29.6	ii
Other Authorities:	
29 C.F.R. § 1630 App. (1997)	8
29 C.F.R. § 1630, App. § 1630.2(h)	6
29 C.F.R. § 1630, App. § 1630.2(j) (1997)	5, 6
29 C.F.R. § 1630.2(j)(1) (1997)	4
29 C.F.R. § 1630.2(j)(3)(i) (1997)	12, 15
29 C.F.R. § 1630.2(j)(3)(ii) (1997)	13
29 C.F.R. § 1630.2(l) (1997)	11
American Optometric Association News, January 26, 1998	4

Contents

	Page
H.R. Rep. No. 485, 101st Cong., 2nd Sess. 346 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 346.	4

REASONS FOR DENYING THE WRIT

I.

THE TENTH CIRCUIT'S DECISION DOES NOT CREATE AN INTER-CIRCUIT CONFLICT.

A. The Tenth Circuit's Decision That Poor Vision Correctable by Eyeglasses is Not a Disability is in Accord with Every Other Circuit Court Which Has Considered This Issue.

The Tenth Circuit decided that a myopic (nearsighted) individual whose vision is *totally* corrected by the use of eyeglasses or contacts is not disabled under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) ("ADA"), because he or she is not substantially limited in a major life activity.[1] (Petitioners' Appendix at A-17 to 18.) This decision does not create an inter-circuit conflict. In fact, the decision is supported by every other circuit court that has considered the same issue.[2]

In *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994), the Fifth Circuit decided that a person with vision that can be corrected to 20/60

1. A person is disabled under the ADA if he or she has an impairment that substantially limits a major life activity, has a record of such impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2).

2. Two circuit courts have decided that vision impairments which were *not* correctable were disabilties under the ADA. *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998) (plaintiff totally blind in one eye); *Kirkingburg v. Albertson's, Inc.*, No. 96-35002, 1998 U.S. App. LEXIS 9439 (9th Cir. May 11, 1998) (plaintiff with vision of 20/200 that could not be corrected). No circuit court has decided that a minor, totally correctable vision problem is a disability.

is not handicapped, as that term is defined by the Rehabilitation Act.[3] More recently, the First Circuit addressed this issue head on:

> the availability of such a simple, inexpensive remedy [eyeglasses or contacts], that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of "minor, trivial impairment[ ]," Senate Report at 23, that would not be considered a disability under the ADA.

Arnold v. United Parcel Service, Inc., 136 F.3d 854, 866 n.10 (1998) (distinguishing correctable myopia from diabetes that was controlled by medication (which the court found to be a disability)).

The Seventh Circuit has twice come to the same conclusion. In *Roth v. Lutheran General Hosp.*, 57 F.3d 1446 (1995), a person with strabismus (a condition in which the eyes are not correctly aligned) which was significantly corrected by the use of glasses was found not to be disabled because his impairment was not substantially limiting: plaintiff was a pharmacist and a lawyer and was working his way through medical school. *Id.* at 1455.

> While [plaintiff's] condition is not completely correctable through the use of glasses or other means, [plaintiff] has "adapted well to daily activities and he should have the visual capacity to function well in most medical specialties."

3. Congress intended the term "disabled" to be construed in accordance with the Rehabilitation Act's term "handicapped individual." *Bragdon v. Abbott*, No. 97-156, 1998 U.S. LEXIS 4212, at *14 (June 25, 1998).

Id. See also Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 675 (7th Cir. 1998) ("Not every physical or mental impairment 'counts' for ADA purposes, because most disabilities from which people suffer (*bad vision*, impaired hearing, arthritic joints, diabetes) do not have a substantial enough effect on their major life activities.") (emphasis added).

The Tenth Circuit's decision that correctable myopia is not a disability does not create a conflict among the circuits and a grant of certiorari is not, therefore, appropriate in this case.

B. The Tenth Circuit Correctly Decided This Issue.

Congress did not intend that a minor and relatively common impairment such as nearsightedness (for which there is a simple and inexpensive remedy) be a covered disability. The text of the ADA, as well as its legislative history, mandates this conclusion.

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society. . . .

42 U.S.C. § 12101(7). This language, drawn from the findings and purposes section of the ADA, simply does not describe the millions of nearsighted Americans with eyeglasses.

Commenting on what were reasonable accommodations for blind and visually-impaired persons, the House Committee on Education and Labor referred to

> adaptive hardware and software for computers, electronic visual aids, braille devices, talking

> calculators, magnifiers, audio recordings and brailled material.

H.R. Rep. No. 485, 101st Cong., 2nd Sess. 346 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 346. The ADA itself describes auxiliary aids which can assist persons with visual impairments: "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments." 42 U.S.C. § 12102(1)(B). By reference to accommodations such as braille devices and audio recordings, and auxiliary aids such as qualified readers and taped texts, it is clear Congress did not intend to cover easily correctable visual impairments such as nearsightedness.

Second, the Tenth Circuit applied the law correctly. To be deemed disabled under the ADA, the impairment in question must substantially limit a major life activity. 42 U.S.C. § 12102(2)(A). For an impairment to be substantially limiting, the person must be "unable to perform a major life activity that the average person in the general population can perform" or be "significantly restricted *as to the condition, manner or duration* under which [he or she] can perform a particular major life activity as compared to [the average person]." 29 C.F.R. § 1630.2(j)(1) (1997) (emphasis added). It appears to have been assumed by Petitioners that the term "average" equates to "perfect." This is far from true where vision is concerned.[4]

As the Tenth Circuit noted "[p]laintiffs merely don their eye glasses [or contact lenses] and go about all their normal activities in the same or similar [ ] manner [ ] as the average person" and therefore are not disabled. (Petitioners' Appendix

4. For whatever persuasive value the Court deems it to have, the January 26, 1998 *American Optometric Association News* noted that more than half of all Americans (fifty-five percent (55%) or 147 million people) wear glasses or contacts to correct vision problems.

at A-18.) The Tenth Circuit simply and correctly found that a nearsighted person who can easily correct her vision with eyeglasses or contact lenses is not disabled. Any other conclusion would nullify the ADA's requirement that a person is disabled only if he or she is "substantially limited" in major life activities.

Of course, one of the most compelling arguments as to why the Tenth Circuit correctly decided this issue is the Equal Employment Opportunity Commission ("EEOC") Guidance, cited by the Tenth Circuit in its opinion:

> [A]n individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working . . . [and is] not substantially limited in the ability to perform any other major life activity.

29 C.F.R. § 1630, App. § 1630.2(j) (1997).

Correctable myopia is not a substantially limiting impairment and therefore is not a disability — and Congress never intended it to be considered as such. The Tenth Circuit correctly decided this issue.

C. This Case Does Not Provide the Best Vehicle for Resolving the Subsidiary Issue of Whether Disabilities Should be Determined Without Regard To Mitigating Measures.

In coming to its decision that Petitioners' myopia did not constitute a disability, the Tenth Circuit concluded that corrective eyewear (Petitioners' "mitigating measures") *should* be

considered when determining whether a person is disabled under the ADA.[5] (Petitioners' Appendix at A-16.) The Court reasoned that since the ADA requires a person to be substantially limited in a major life activity in order to find her to be disabled, courts should be

> concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.

(Petitioners' Appendix at A-16.)

While there is a split of authority among the circuit courts on this subsidiary issue of whether to adopt the EEOC Guidance,[6] *there is no split* when the mitigating measures in question are common, everyday eyeglasses and contacts. Even the circuit courts that have decided to adopt the EEOC Guidance and *not* take mitigating measures into consideration when making disability determinations have not so held when the mitigating measures in question are eyeglasses and contacts. *See, e.g., Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866 n.10 (1st Cir. 1998) (holding that diabetes totally controlled by medication was a disability, but noting that the court would likely not reach the same result if correctable myopia was at

5. The EEOC issued an ADA Guidance stating that whether a person has an impairment, and whether that impairment is substantially limiting, should be determined *without regard* to mitigating measures. 29 C.F.R. § 1630, App. § 1630.2(h), (j) (1997). The Tenth Circuit decision is at odds with the EEOC Guidance in this case.

6. *See, e.g., Arnold*, 136 F.3d at 864-6 (adopting Guidance and evaluating diabetes in its unmedicated state); *Gilday v. Mecosta County*, 124 F.3d 760, 766-67 (6th Cir. 1997) (2-1 decision *rejecting* Guidance and determining that plaintiff with diabetes was not disabled).

issue). Even if the Court was concerned about the general split of authority on this issue, the Court should still deny the petition because the facts presented by this case do not provide the best vehicle for resolution of the mitigating measures question.

The mitigating measures issue arises in a variety of factual contexts, most typically involving the use of medicines (to control diabetes, for example) or medical devices (such as pacemakers and hearing aids).[7] In this case, however, the mitigating measures at issue are eyeglasses (or contacts): Petitioners have perfect vision once they put on their eyeglasses.

Assuming the Tenth Circuit's ultimate decision was correct (that Congress did not intend the ADA to cover the millions of persons in America whose vision is correctable by the use of eyeglasses), then analyzing the mitigating measures issue on these facts poses the following problem for the Court. Either the Court must expand the reach of the ADA beyond what was intended by Congress or the Court must be willing to issue a ruling that will be distinguishable on its facts. In other words, if the Court decides in this case to adopt the EEOC guidance and hold that the use of mitigating measures such as eyeglasses should *not* be considered when making disability determinations, then the door opens to claims involving countless other slight and commonplace conditions that Congress clearly did not intend the ADA to reach.

On the other hand, if the Court upholds the Tenth Circuit's decision that use of mitigating measures such as eyeglasses and contacts *should* be considered in making disability determinations, then the Court will be left with a ruling that

7. *See, e.g., Arnold*, 136 F.3d at 864-6 (diabetes); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 517 (11th Cir. 1996) (Graves disease); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 935 (3rd Cir. 1997) (epilepsy).

will be susceptible to arguments that eyeglasses and contacts (unlike the medicines and medical devices which help control diabetes, heart conditions and other more serious, and often life-threatening illnesses) were simply too commonplace and too diminimus of a remedy for the Court not to take them into consideration.

Hence, the decision would likely be too narrow to be of guidance. There are many other more suitable cases pending in the lower courts at this time that will allow this Court to resolve the mitigating measures question on more illuminating facts. *See, e.g., Baert v. Euclid Beverage Limited*, No. 97-1474, 1998 U.S. App. LEXIS 15293, at *6-7 (7th Cir. July 10, 1998) (diabetes controlled by medication is a disability); *Wright v. City of Tampa*, No. 97-408-CIV-T-17F, 1998 U.S. Dist. LEXIS 4338, at *2 (M.D. Fla. March 26, 1998) (evaluating a blood disorder without regard to corrective medication).

II.

THE TENTH CIRCUIT GAVE APPROPRIATE CONSIDERATION TO THE EEOC'S INTERPRETIVE GUIDANCE ON MITIGATING MEASURES UNDER APPLICABLE SUPREME COURT LAW.

The EEOC's position that disabilities be determined without regard to mitigating measures is not found in the regulations promulgated pursuant to the ADA, but rather in an appendix to the ADA regulations titled "Interpretive Guidance on Title 1 of the Americans with Disabilities Act." 29 C.F.R. § 1630 App. (1997). This guidance constitutes a set of interpretive, rather than legislative, rules not subject to public notice and comment procedures under the Administrative Procedure Act ("APA"). While legislative rules promulgated under the APA (agency regulations, for example) are to be given "controlling weight

unless they are arbitrary, capricious, or manifestly contrary to the statute," *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (giving deference to EPA regulations promulgated under the Clear Air Act),[8] informal interpretive rules like those at issue here are not afforded the same consideration. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

In *Meritor*, this Court stated that the EEOC's interpretive rules governing sexual harassment under Title VII, 'while not controlling upon the courts by reason of their authority, do constitute a body of law to which courts and litigants *may* properly resort for guidance.' " *Id.* (emphasis added); *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 312-316 (1979) ("A court is *not required* to give effect to an interpretive regulation [rules issued without the required procedures of the ADA].") (emphasis added). This Court has been clear: adoption of interpretive rules is permissive rather than mandatory.

The Tenth Circuit's opinion is in accord with this law: the Court acknowledged that the EEOC's Interpretive Guidance may be entitled to some weight or consideration, but correctly noted that it does not carry the force of law and is not entitled to the deference afforded by *Chevron*. (Petitioners' Appendix at A-9, n. 3.) The Tenth Circuit then discussed the Guidance at length and adopted it in part. (Petitioners' Appendix at A-9, A-14 to 15.)[9] Despite Petitioners' argument to the contrary, the Tenth Circuit was not required to do more.

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8. *See also Bragdon v. Abbott*, 1998 U.S. LEXIS 4212 at *38-39 (Justice Department regulations construing public accommodations section of ADA entitled to deference under *Chevron*).

9. The Court adopted the EEOC Guidance on mitigating measures in relation to determining whether a plaintiff had an impairment, but not with regard to determining if that impairment was substantially limiting. (Petitioners' Appendix A-9, A-14 to 15.)

Regardless, the law is clear that "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989). In this case, the Tenth Circuit ultimately concluded that the

> portion of the EEOC's Interpretive Guidance [requiring that whether an impairment is substantially limiting be determined without regard to mitigating measures] is in direct conflict with the plain language of the ADA.

(Petitioners' Appendix at A-16.) As a result, under the Court's analysis, *no* deference was due to the Guidance.

This issue simply provides no additional basis for certiorari review. There is a plethora of Supreme Court law on the issue of agency deference. The Tenth Circuit correctly applied that law and its opinion in this case does not create an inter-circuit conflict (that some circuit courts afforded more deference to the Guidance than was due under well-established Supreme Court law does not create a split of authority). Petitioners' writ does not warrant a grant of certiorari.

III.

THE TENTH CIRCUIT CORRECTLY APPLIED THE LAW IN CONCLUDING THAT PETITIONERS COULD PRESENT NO SET OF FACTS BASED ON THEIR AMENDED COMPLAINT ESTABLISHING THAT UNITED REGARDED THEM AS DISABLED.

The Tenth Circuit held that Petitioners could present no set of facts based on their Amended Complaint establishing that Respondent United Air Lines, Inc. ("United") regarded them as

having a substantially limiting impairment. (Petitioners' Appendix at A-24.) Petitioners allege that the Tenth Circuit erroneously considered the perceptions of other employers in the industry in reaching this conclusion. Specifically, Petitioners contend that while the Tenth Circuit's decision properly recognized that "[i]t is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters," (Petition at 12), the Tenth Circuit nevertheless failed to apply this rule to the particular facts and circumstances of the case. This is rarely a basis for granting certiorari (*see* Supreme Court Rule 10) and, even if it were, Petitioners' argument fails because the Tenth Circuit correctly applied the law.

Under the third prong of the statutory definition of "disability," a person is disabled if he is regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual. *See* 42 U.S.C. § 12102(2)(C). The limiting adjectives "substantially" and "major" indicate that the perceived "impairment must be a significant one." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Byrne v. Board of Educ., Sch. Dist. Of West Allis*, 979 F.2d 560, 564 (7th Cir. 1992)). A person is "regarded as having" an impairment that substantially limits the person's major life activities when other people *treat* that person as having a substantially limiting impairment. *See* 29 C.F.R. § 1630.2(l) (1997) (emphasis added).

Petitioners alleged that United regarded them as disabled in the major life activity of working. With respect to the major life activity of working, the term "substantially limited" is defined as

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various

> classes as compared to the average person having comparable training, skills and abilities.

29 C.F.R. § 1630.2(j)(3)(i) (1997). Thus, the mere "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*[10] In making this determination, courts may consider:

> (A) the geographical area to which the individual has reasonable access;
>
> (B) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs *utilizing similar training, knowledge, skills or abilities, within the geographic area*, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographic area, from which the individual is also

10. *See also Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (Feb. 23, 1998) ("[An] employer regards an employee as substantially limited in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved.") (citations omitted); *Miller v. City of Springfield*, No. 97-3268, 1998 U.S. App. LEXIS 13385, at *4 (8th Cir. April 17, 1998) ("A finding that a plaintiff is substantially limited in working requires a showing that her overall employment opportunities are limited.") (citations omitted); *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1133 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997) ("An impairment does not substantially limit the ability to work merely because it prevents a person from performing either a particular specialized job or a narrow range of jobs.") (internal citations and quotations omitted).

> disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii) (1997) (emphasis added).

Based on these regulations, the Tenth Circuit properly concluded that for Petitioners to establish they were disabled under the "regarded as" prong of § 12102(2), Petitioners must prove United treated them as being significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. (Petitioners' Appendix at A-21.)

With this in mind, the Tenth Circuit looked to Petitioners' pleadings. As the Tenth Circuit correctly noted, Petitioners' sole contention in this regard is that United disqualified them from the class of jobs of "global airline pilot." (Petitioners' Appendix at A-22.) Taking this pleading as true, the Tenth Circuit found that "this description [global airline pilot] is too narrow to constitute [a] 'class of jobs.' " (Petitioners' Appendix at A-22.)[11] Accordingly, the Tenth Circuit concluded that assuming Petitioners were able to establish that United treated them as disqualified from all global airline pilot positions, this would be insufficient as a matter of law to establish that United regarded them as substantially limited in the major life activity of working. (Petitioners' Appendix at A-24.)

11. As the Tenth Circuit reasoned, the class of jobs that utilize "similar training, knowledge, skills or abilities" would include, but not be limited to, "all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines." (Petitioners' Appendix at A-23.)

This holding is supported by decisions from other circuits. In *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998), for example, the defendant, Delta Air Lines ("Delta"), filed a motion for summary judgment claiming that the plaintiff could not establish that Delta perceived him as significantly restricted in the ability to perform a "class of jobs." The district court granted Delta's motion and the plaintiff appealed. The Eleventh Circuit affirmed the judgment, finding plaintiff's evidence that Delta perceived him as unable to pilot airplanes for anyone was insufficient to overcome Delta's motion for summary judgment:

> [P]iloting airplanes is too narrow a range of jobs to constitute a "class of jobs" as that term is defined in 29 C.F.R. § 1630.2(j)(3)(ii)(B). . . . There are non-piloting jobs in the Atlanta area which utilize "similar training, knowledge, skills or abilities" as piloting jobs. Such jobs include pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.
>
> . . .
>
> Because [plaintiff] failed to offer any evidence [that Delta regarded him as unable to perform not just the job of being a pilot, but also the non-piloting jobs we have discussed], we conclude that he failed to raise a genuine issue that Delta regarded him as significantly restricted in the major life activity of working.

Id. at 1370; *See also Bridges v. City of Bossier*, 92 F.3d 329, 335-36 (5th Cir. 1996), *cert denied*, 117 S. Ct. 770 (1997) ("[F]irefighting jobs — including firefighters and associated municipal paramedics or EMTs who must also serve as backup firefighters — is too narrow a field to describe a 'class of jobs' under 29 C.F.R. § 1630.2(j)(3)(i).").

Petitioners attempt to avoid this case law by contending that the Tenth Circuit erred in defining the pertinent "class of jobs" to include similar pilot positions with other airlines because, by doing so, the Tenth Circuit imposed "through the back door" the requirement that Petitioners must be regarded as disabled by all employers, not just United. (Petition at 13.) This is simply not true. What the Tenth Circuit did was carefully apply the law mandating that the "class of jobs" include *all* jobs utilizing "similar training, knowledge, skills or abilities." Such "class of jobs" would include similar pilot positions with other airlines, as the Tenth Circuit expressly acknowledged, and all other jobs utilizing "similar training, knowledge, skills or abilities," such as pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer. *See, e.g., Witter*, 138 F.3d at 1370. The Tenth Circuit's analysis is sound and in accord with the other circuit courts that have considered the breadth of the "class of jobs" from which an individual must be regarded as disqualified to be "disabled" under the ADA.

The Tenth Circuit's decision correctly applied the law in holding that Petitioners could present no set of facts based on their Amended Complaint establishing that United perceived them as having a substantially limiting disability. The petition for writ of certiorari should be denied.

CONCLUSION

The Tenth Circuit's decision is well-reasoned and does not create an inter-circuit conflict that should be decided by this Court, or involve a misapplication of the law. A writ of certiorari to review the Tenth Circuit decision is not warranted in this case. Respondent United Air Lines, Inc. respectfully requests that this Court deny Petitioners' writ of certiorari.

Respectfully submitted,

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
BROWNSTEIN HYATT FARBER
& STRICKLAND, P.C.
Attorneys for Respondent
410 Seventeenth Street
22nd Floor
Denver, Colorado 80202
(303) 534-6335

Supreme Court, U.S.
FILED
DEC 21 1998
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(3) (3)

Nos. 97-1943 and 97-1992

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON AND KIMBERLY HINTON, PETITIONERS

v.

UNITED AIR LINES, INC.

VAUGHN L. MURPHY, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

C. GREGORY STEWART
General Counsel

PHILLIP B. SKLOVER
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

PAULA R. BRUNER
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

25 pp

QUESTIONS PRESENTED

1. Whether the determination that a person has an actual disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12102(2)(A), must be made without regard to mitigating measures, such as medicines or prosthetic devices.

2. No. 97-1992 only: Whether an employer that terminates an employee solely because it believes the employee does not satisfy physical criteria established by a third party such as a government regulatory body could be found to have terminated the employee because the employee was "regarded as having" a disability within the meaning of 42 U.S.C. 12102(2)(C).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
1. *Sutton* v. *United Air Lines*	1
2. *Murphy* v. *United Parcel Service*	5
Discussion	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Arnold v. *United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998)	9, 13
Baert v. *Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998)	9
Bartlett v. *New York State Bd. of Law Examiners*, 156 F.3d 221 (2d Cir. 1998)	9
Bragdon v. *Abbott*, 118 S. Ct. 2196 (1998)	11
Campbell v. *Federal Express Corp.*, 918 F. Supp. 912 (D. Md. 1996)	19
Chandler v. *City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994)	10
Daugherty v. *City of El Paso*, 56 F.3d 695 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996)	19
Doane v. *City of Omaha*, 115 F.3d 624 (8th Cir. 1997), cert. denied, 118 S. Ct. 693 (1998)	9-10
Gilday v. *Mecosta County*, 124 F.3d 760 (6th Cir. 1997)	10, 12
Harris v. *H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996)	10
Holihan v. *Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996), cert. denied, 520 U.S. 1162 (1997)	10

Cases—Continued: Page

Kirkingburg v. *Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998), petition for cert. pending, No. 98-591 10
Matczak v. *Frankford Canay & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997) 9
Office of Federal Contract Compliance Programs v. *Commonwealth Aluminum*, No. 82-OFC-6, 1994 WL 59429 (Feb. 10, 1994) 12
Prado v. *Continental Air Transp. Co.*, 982 F. Supp. 1304 (N.D. Ill. 1997) 19
Washington v. *HCA Health Servs.*, 152 F.3d 464 (5th Cir. 1998) 10, 14

Statutes, regulations and rule:

Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*:
42 U.S.C. 12102(2) 3
42 U.S.C. 12102(2)(A) 8
42 U.S.C. 12102(2)(C) 16
42 U.S.C. 12112(a) 9, 18
42 U.S.C. 12113(b) 9, 18
42 U.S.C. 12116 12
42 U.S.C. 12134(a) 12
42 U.S.C. 12186(b) 12
Rehabilitiation Act of 1973, § 503, 29 U.S.C. 793 12
28 C.F.R.:
Pt. 35 App. A § 35.104 12
Pt. 36 App B § 36.104 12
29 C.F.R.:
Section 1630.2(j)(1)(ii) 14
Section 1630.2(j)(3)(i) 19
Section 1630.15(e) 18
Pt. 1630 App.:
§ 1630.2(h) 4
§ 1630 2(j) 12

Regulations and rule—Continued: Page

49 C.F.R.:
Section 390.3(a) 19
Section 391.41(b)(6) 5, 17
Section 391.43(f) 17
Fed. R. Civ. P. 12(b)(6) 1

Miscellaneous:

Federal Highway Admin., *Medical Adivsory Criteria for Evaluation Under 49 C.F.R. 391.41* (last modified Apr. 8, 1998) <http://mcregis.fhwa.gov/medical.htm> 19
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990) 11
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) 11, 13

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. *Sutton* v. *United Air Lines.* The district court dismissed the complaint filed by petitioners Karen Sutton and Kimberly Hinton, on the ground that it failed to state a claim on which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). The court of appeals affirmed.

a. The complaint alleged that petitioners, who are identical twin sisters, sought commercial pilot positions with respondent in 1992. Amended Compl. at 4. Petitioners alleged that they were regional airline pilots at the time, and that they amply satisfied the basic age, education, experience, and FAA certification qualifications for a pilot's job with respondent. *Id.* at 3. They claimed that respondent granted them interviews for pilot positions, but that respondent informed each of them at the time of the interview that their uncorrected vision did not comply with respondent's minimum requirements. *Id.* at 4, 6. Petitioners alleged that respondent "rejected [petitioners] on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability." *Id.* at 9.

With respect to the details of their vision, each petitioner alleged that her uncorrected eyesight is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but each petitioner also alleged that "[w]ith the use of corrective lenses, [she] has vision that is 20/20 or better." Amended Compl. at 6. They alleged that, without corrective lenses, each of them "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores." *Id.* at 7. They also alleged, however, that "[w]ith corrective measures, * * * [each of them] function[s] identically to individuals without a similar impairment." *Ibid.*

b. The district court ruled that petitioners had failed to state a claim upon which relief may be granted. 97-1943 Pet. App. A27-A37. Under the ADA:

> The term "disability" means, with respect to an individual —

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. 12102(2).

The district court first examined the existence of an actual limiting impairment under clause (A). The court noted that "numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities," 97-1943 Pet. App. A32, and that petitioners therefore "have not stated a claim that they are substantially limited in the major life activity of seeing." *Id.* at A33. The court also held that petitioners' "common moderate vision impairment * * * does not substantially limit their ability to work within the meaning of the ADA." *Id.* at A34. In the court's view, "the ADA was intended to protect only a limited class of persons; specifically individuals who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared." *Id.* at A35.

The district court also held that petitioners had failed to state a claim that respondent "regarded" them as disabled under clause (C) of the disability definition. The court stated that "[t]he statutory reference to a substantial limitation indicates that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." 97-1943 Pet. App. A36-A37. In the court's view, "[a]t

most, [petitioners] can establish that [respondent] regarded them as unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at A37. The court added that petitioners "have had no difficulty obtaining other jobs in their field prior to this one." *Ibid.*

c. The court of appeals affirmed. 97-1943 Pet. App. A1-A25. Guided by the EEOC's regulatory definition of "impairment," under which "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices," 29 C.F.R. Pt. 1630 App. § 1630.2(h) para. 2, the court held that petitioners had adequately alleged that they suffered from an "impairment" of vision under the ADA. 97-1943 Pet. App. A9-A11. The court held, however, that "[t]he determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." *Id.* at A16. The court concluded that "while [petitioners'] uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing," they "can prove no set of facts upon which relief may be granted" because their vision is correctable. *Id.* at A17-A18.

The court also held that they had not set forth a claim upon which relief could be granted under the "regarded as" prong of the statute. The court stated that "in order to establish a disability under the 'regarded as' prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." 97-1943 Pet. App. A21. Although the court accepted as true petitioners' allegation

that they "were disqualified from 'all pilot positions' as they alleged in their Amended Complaint," the court nonetheless held that petitioners "cannot show disqualification from a 'class of jobs.'" *Id.* at A22.

2. *Murphy* v. *United Parcel Service, Inc.* The district court granted summary judgment to respondent on petitioner's claim under the ADA. The court of appeals affirmed.

a. Petitioner has had high blood pressure (hypertension) since he was ten years old. For 22 years, petitioner worked as a mechanic. Despite the fact that his blood pressure was very high (approximately 250/160, see 97-1992 Pet. App. 9a), it was controlled by medication. His own physician and respondent's physician both testified that, with medication, petitioner's "hypertension does not significantly restrict his activities and that in general he can function normally and can engage in activities that other persons normally do." *Id.* at 13a.

In August 1994, respondent hired petitioner as a mechanic—a job whose functions include driving commercial motor vehicles on "road tests" and "road calls," and which therefore requires satisfaction of Department of Transportation requirements. 97-1992 Pet. App. 14a. Among those requirements is that the driver of a commercial motor vehicle "[h]as no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. 391.41(b)(6). The district court construed a subsequent DOT publication to provide that "in order to be physically qualified to drive a commercial motor vehicle * * *, an individual must maintain

blood pressure less than or equal to 160/90." 97-1992 Pet. App. 16a.[1]

At the time he was hired, petitioner's blood pressure was measured as 186/124. 97-1992 Pet. App. 16a. In September 1994, respondent realized that petitioner had not satisfied the 160/90 standard, and petitioner was retested; his blood pressure was approximately 160/104. See 97-1992 Pet. 2. Petitioner's treating physician "testified that [petitioner] is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects." 97-1992 Pet. App. 16a. On October 5, 1994, respondent fired petitioner. *Id.* at 16a-17a.

b. The district court held that, for purposes of determining whether petitioner had shown that he had a disability, his "impairment should be evaluated in its medicated state." 97-1992 Pet. App. 29a. The court noted that "[t]he only limitation specifically set by [petitioner's] treating physician" was a restriction on repetitive lifting of items weighing 200 pounds or more. *Id.* at 31a. The court stated that such a limitation "is not of such a nature as to significantly restrict him in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities," and that therefore petitioner's "high blood pressure and its concomitant effects do not constitute a disability under the ADA." *Ibid.* The court also concluded that "[respondent] did not regard [petitioner] as disabled, but only that he was not certifiable under DOT regulations." *Id.* at 32a. Finally, the district court concluded that petitioner was not qualified for the job,

[1] Both courts below misconstrued the import of the DOT regulations. See note 5, *infra*.

id. at 33a-35a, that in any event respondent's compliance with DOT regulations was a complete defense to petitioner's ADA claim, *id.* at 35a-37a, and that any accommodation by respondent to petitioner's condition "would have been an undue hardship on [respondent]," *id.* at 37a.

c. The court of appeals affirmed, in an unpublished opinion. 97-1922 Pet. App. 1a-6a. The court noted that petitioner's own doctor had testified that "when his high blood pressure is medicated, he 'functions normally doing everyday activity that an everyday person does.'" *Id.* at 4a. Relying on its holding in *Sutton* that the "substantial limitation" inquiry should assess the individual after mitigating or corrective measures are taken, the court held that petitioner's high blood pressure is therefore not a disability. *Ibid.*

The court of appeals also affirmed the district court's ruling that respondent did not regard petitioner as having an impairment that limits a major life activity. The court stated that "[respondent] did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but "because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." 97-1992 Pet. App. 5a. In the court's view, it followed that respondent "in its termination decision, did not regard [petitioner] as having an impairment that substantially limits a major life activity." *Ibid.* The court expressly declined to reach the questions whether petitioner was "otherwise qualified" for the job under the ADA, *ibid.*, and whether the DOT regulations would provide a defense to petitioner's ADA claim. *Id.* at 5a-6a.

DISCUSSION

Both *Sutton* and *Murphy* present the basic question whether the existence of an actual disability under the ADA is to be assessed with or without taking into consideration mitigating or ameliorative measures employed by the individual involved. The courts of appeals are divided on that issue; at least six circuits have held, consistently with the legislative history and authoritative regulatory construction of the ADA, that mitigating measures should not be taken into account. Two courts of appeals, including the Tenth Circuit in these cases, have held that mitigating measures should be taken into account. The issue on which the courts of appeals are divided is a significant one, and further review by this Court to resolve the conflict is therefore warranted. Although the question of mitigating measures is presented by both *Sutton* and *Murphy*, the courts of appeals have tended to view correctable vision impairments like those at issue in *Sutton* as special cases. Because *Murphy* thus presents the mitigating measures issue in a context that is likely to lead to a more general resolution of the issue, *Murphy* provides a better vehicle for the Court to address the mitigating measures issue. In addition, if further review is granted with respect to the mitigating measures issue in *Murphy*, the Court may well benefit from the opportunity to review that issue in the broader context that would be provided by reviewing as well the Tenth Circuit's resolution of the related "regarded as" issue in that case.

1. The basic definition of "disability" under the ADA is an "impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. 12102(2)(A). That definition does not specify whether

the existence or substantiality of the limitation should be measured with or without mitigating or ameliorative measures that the individual could take to improve his or her functioning.

The question whether mitigating or ameliorative measures should be taken into account in assessing a disability has been the subject of frequent litigation, because it is often dispositive of an ADA claim. In employment cases, for example, an individual who is found not to be disabled because mitigating measures are taken into account—and who is not disabled under the "record of disability" or "regarded as" prongs of the statutory definition—is not protected by the ADA. Even if the individual is qualified for the job, see 42 U.S.C. 12112(a), the employer discriminates against him because of his impairment, the individual poses no threat to the health or safety of anyone, see 42 U.S.C. 12113(b), and a reasonable accommodation is readily available that would permit him to do the job, the individual has no claim under the ADA.

Addressing a wide range of physical and mental impairments, the courts of appeals have divided on whether mitigating measures should be taken into account in assessing whether an individual has a disability under the ADA. The First, Second, Third, Seventh, Eighth, and Eleventh Circuits have held that mitigation is not to be considered. See *Arnold* v. *United Parcel Service, Inc.*, 136 F.3d 854, 859-866 (1st Cir. 1998) (diabetes); *Bartlett* v. *New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998) (learning disability); *Matczak* v. *Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938 (3d Cir. 1997) (epilepsy); *Baert* v. *Euclid Beverage, Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998) (diabetes); *Doane* v. *City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997) (blindness in one eye),

cert. denied, 118 S. Ct. 693 (1998); *Harris* v. *H & W Contracting Co.*, 102 F.3d 516, 520-521 (11th Cir. 1996) (Graves' disease, an endocrine disorder affecting the thyroid gland).[2] The Tenth Circuit in the instant cases and the Sixth Circuit have ruled that mitigation should be considered. See *Gilday* v. *Mecosta County*, 124 F.3d 760, 766-768 (6th Cir. 1997) (diabetes) (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part); see also *id.* at 761 (noting that the "opinion of the [sic] Judge Kennedy is the opinion of the court with respect to" the mitigating measures issue). The Fifth Circuit has taken a middle position, holding in a case involving a degenerative rheumatoid condition and a related kidney disease that "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state." *Washington* v. *HCA Health Servs.*, 152 F.3d 464, 470-471 (5th Cir. 1998); cf. *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994).

2. In our view, the majority position on this issue in the courts of appeals is correct. Although the courts of appeals that have held that mitigating measures should be taken into account have argued that the plain terms of the Act mandate that result, see 97-1943 Pet. App. A16; *Gilday*, 124 F.3d at 766-767 (Kennedy, J.,

[2] In addition, the Ninth Circuit has recited the no-mitigation rule without significant discussion, but then ruled against the plaintiffs on other grounds. See *Holihan* v. *Lucky Stores, Inc.*, 87 F.3d 362, 364 (9th Cir. 1996), 117 S. Ct. 1349 (1997); see also *Kirkingburg* v. *Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) (amblyopia ("lazy eye") may be disability, even if brain compensates for it), petition for cert. pending, No. 98-591.

concurring in part and dissenting in part), most courts have held that the terms of the Act are susceptible of either interpretation. The committee reports, however, make clear Congress's understanding that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 52 (1990); see also *id.*, Pt. 3, at 28 ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."). Indeed, the House Reports recounted specific examples that corroborate this understanding:

> [A] person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Id., Pt. 2, at 52; accord *id.*, Pt. 3, at 28-29.

In addition, the agencies entrusted with administering the ADA, and whose views are entitled to deference, see *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2209 (1998), have similarly concluded that mitigating measures should not be taken into account. In promulgating regulations defining the term "substantially limits," the Equal Employment Opportunity Commission explained that "[t]he determination of whether an individual is substantially limited in a major life activity must be

made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j). See 42 U.S.C. 12116 (requiring EEOC to promulgate regulations "to carry out" Title I of the ADA). The Department of Justice, which is required to promulgate regulations to implement Titles II and III of the ADA, see 42 U.S.C. 12134(a), 12186(b), has also concluded that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." 28 C.F.R. Pt. 35 App. A § 35.104 (preamble to Title II regulations); 28 C.F.R. Pt. 36 App. B § 36.104 (preamble to Title III regulations). These views are consistent with those of the Department of Labor, which enforces Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793. See *Office of Federal Contract Compliance Programs* v. *Commonwealth Aluminum*, No. 82-OFC-6, 1994 WL 59429, at *6 (Feb. 10, 1994).

3. The question whether mitigating measures should be taken into account in assessing whether an individual has a disability under the ADA is ripe for this Court's resolution. The conflict in the circuits on the issue is clear. There is no reason why an individual's rights or an employer's obligations under the ADA should depend on the fortuity of the circuit in which the individual is employed; as respondent in *Murphy* cogently states, the plight of a national employer that operates in many locations across the country is particularly difficult. See 97-1992 Br. in Opp. 4. Finally, absent review by this Court, the conflict in the circuits appears likely to endure. Although the fractured opinions in *Gilday* suggest that the Sixth Circuit's view on the issue may not yet be firm, the Tenth Circuit in

the instant cases has squarely held that mitigating measures should be taken into account in determining disability. The six circuits that have reached the opposite conclusion have similarly failed to display any indication that their views are tentative or likely to change. Accordingly, further review of this question is warranted.

4. Although *Sutton* and *Murphy* both present the question whether mitigating measures should be taken into account in determining disability, the *Murphy* case provides a better vehicle for the Court to address the issue. Few courts of appeals have addressed correctable myopia—the impairment at issue in *Sutton*—as a disability, perhaps because employers and others (at least outside a few contexts, such as the transportation industry and law enforcement) rarely discriminate on the basis of a correctable vision impairment. But, aside from the Tenth Circuit, the other courts of appeals that have addressed the issue have tended to distinguish correctable vision impairments from other impairments.

For example, the First Circuit in *Arnold* held unequivocally that disabilities are generally to be assessed under the ADA without regard to mitigating measures. See 136 F.3d at 863. The court nonetheless noted that it "might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses." 136 F.3d at 866 n.10. In the court's view, "[t]he availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of 'minor, trivial impairment[], * * * that would not be considered a disability under the ADA." *Ibid.* (quoting S. Rep. No. 116, *supra*, at 23). Those same factors seem to underlie the Fifth Circuit's

view that it "c[ould] not say whether mitigating measures such as eyeglasses or laser surgery should be considered in assessing whether an individual is disabled." *Washington* v. *HCA Health Servs.*, 152 F.3d at 471. The district court in *Sutton* similarly described myopia as a "slight shortcoming[] that [is] both minor and widely shared," 97-1943 Pet. App. A35, whose recognition as a disability would in its view "subvert[] the policies and purposes of the ADA and distort[] the class the ADA was meant to protect," *id.* at A36.

We do not agree that the analysis of a correctable vision impairment differs from the analysis of other impairments under the ADA. There are, however, features of vision impairments like myopia that set them somewhat apart from other impairments under the ADA.[3] If the Court were to grant further review in *Sutton*, therefore, it is possible that the Court's ultimate decision would turn on narrow issues about the analysis of myopia under the ADA without resolving the more general question of whether mitigating measures should be taken into account in assessing other impairments. Because hypertension—the condition at

[3] Correctable vision impairments under the ADA may present certain unique issues. In determining whether a given correctable vision impairment substantially limits the major life activity of seeing, the claimant's ability to see would have to be compared with "the condition, manner, or duration under which the *average person in the general population* can perform that same major life activity." 29 C.F.R. 1630.2(j)(1)(ii) (emphasis added). Because correctable vision impairments are so widespread, a number of issues arise regarding how to make the comparison between the claimant and "the average person in the general population" and regarding how far the claimant's vision must diverge from the "average person" before the claimant could be found to have a disability. Those issues were not addressed by the court of appeals in *Sutton* and have received little attention from other courts.

issue in *Murphy*—is far more typical of the types of impairments at issue in ADA cases, further review in *Murphy* would give the Court a better opportunity more generally to resolve the conflict in the circuits regarding whether mitigating measures should be taken into account.

The question that divides the circuits is squarely presented in *Murphy*. There is no dispute that, if a disability is to be assessed in the unmitigated state, petitioner in *Murphy* has a disability; his blood pressure is so high without medication (250/160, see 97-1992 Pet. App. 9a) that it would pose an immediate threat to his health. See 97-1992 Pet. 7. There also appears to be no dispute that, if a disability is to be assessed in its mitigated state, petitioner in *Murphy* does not have a disability. Although petitioner himself apparently claims that he has chosen to limit some activities as a result of his blood pressure, see 97-1992 Pet. App. 13a, petitioner's physician testified that petitioner's only restriction is that he should not repetitively lift weights weighing more than 200 pounds, see *id.* at 13a, 31a. The district court held that that restriction alone was insufficient to present a material issue of fact regarding whether petitioner was substantially limited in a major life activity. See *id.* at 31a. Because there is no basis to disturb that holding, the question whether petitioner has an actual disability thus turns entirely on whether his high blood pressure is to be assessed in its mitigated or unmitigated state.[4]

[4] Of course, even if the Court agreed with petitioner that he is disabled, that would not establish that petitioner can make out his ADA claim. There would remain at least the further issues that the court of appeals declined to reach: whether he was qualified for the job of mechanic at UPS and whether the DOT regulations would provide UPS with a defense. See 97-1992 Pet. App. 5a-6a.

5. The petition in *Murphy* presents three questions in addition to the question regarding mitigating measures. The second question presented concerns whether the issuance of a DOT health card to petitioner precludes respondent's claim that petitioner does not satisfy DOT health standards. 97-1992 Pet. 1. That question appears to concern the particular factual context of this case, it was not reached by the court of appeals, see 97-1992 Pet. App. 5a-6a, and it therefore does not warrant further review. The third question presented concerns whether respondent could have performed his job with reasonable accommodations. See 97-1992 Pet. i. That question does not warrant review; the court of appeals did not reach that question (because it held that petitioner was not disabled and therefore no reasonable accommodation was required), and in any event it appears to be of relevance only in the particular factual circumstances of this case.

The fourth question presented in *Murphy* concerns the court of appeals' holding that summary judgment was properly granted to respondent on petitioner's claim that respondent regarded him as disabled, under 42 U.S.C. 12102(2)(C). See 97-1992 Pet. i. Petitioner claimed that, regardless of whether he was in fact disabled, respondent regarded him as disabled when it terminated his employment, because respondent regarded him as substantially limited in the major life activity of working. The Tenth Circuit rejected that claim. The court concluded that respondent did not regard petitioner as disabled because respondent "did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but rather it terminated him "because his blood pressure exceeded the DOT's requirements for drivers

of commercial vehicles." 97-1992 Pet. App. 5a.[5] In the court's view, the fact that respondent viewed petitioner as unable to hold the job because of government regulatory criteria was insufficient to raise a material issue of fact as to whether respondent viewed petitioner as disabled—*i.e.*, as substantially limited,

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[5] Both courts below erred in concluding the DOT standards preclude someone with blood pressure higher than 160/90 from obtaining a commercial driver's license. See 97-1992 Pet. App. 5a, 15a-16a, 35a. A regulation issued by the Federal Highway Administration prohibits the operation of commercial motor vehicles by individuals who have "a current clinical diagnosis of high blood pressure *likely to interfere with his/her ability to operate a commercial motor vehicle safely.*" 49 C.F.R. 391.41(b)(6) (emphasis added). The regulations further provide that, when an individual is tested under that standard, "[i]f the blood pressure is consistently above 160/90 mm. Hg., further tests may be necessary to determine whether the driver is qualified to operate a commercial motor vehicle." 49 C.F.R. 391.43(f). Thus, although the general rule prohibits individuals whose high blood pressure would interfere with vehicle operation from operating commercial vehicles, blood pressure above 160/90 does not necessarily or categorically trigger that prohibition.

The district court referred to a Federal Highway Administration document entitled "Medical Advisory Criteria for Evaluation Under 49 C.F.R. Part 391.41." 97-1992 Pet. App. 15a-16a. That document recommends that no driver with blood pressure over 181/105 should be qualified to operate a motor vehicle and that drivers with blood pressure between 160/90 and 181/105 may drive for three months and then may be retested to determine whether their blood pressure has been reduced to 160/90 or below. But the document notes that its recommendations "are simply guidance established to help the medical examiner determine a driver's medical qualifications" and that "[t]he medical examiner may, but is not required to, accept the recommendations." Accordingly, this document does not absolutely preclude petitioner from obtaining a commercial driver's license.

because of his impairment, in the major life activity of working.

In our view, the court of appeals' holding on this point was a clear legal error. Regardless of whether respondent based its termination of petitioner on "unsubstantiated fear" concerning his hypertension or on a belief that, as a result of petitioner's hypertension, DOT standards precluded him from driving commercial vehicles, respondent regarded petitioner's impairment as substantially limiting his ability to work. Although the alleged failure to satisfy DOT standards could—if it were correct—assist respondent in showing that petitioner was not qualified for the job, see 42 U.S.C. 12112(a), that petitioner would "pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), or that petitioner failed a "qualification standard" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. 12113(a),[6] it does not establish or suggest that petitioner was not regarded as substantially limited in his ability to work. To the contrary, it was the very basis for respondent's decision to regard petitioner as substantially limited in his ability to work.

If the Court determines to grant review with regard to the "mitigating measures" issue in *Murphy*, the Court may well determine that review should be granted on this issue as well. It is true that, because the court of appeals' decision is unpublished, its ruling on this point does not create a cognizable conflict with any decision of any other court of appeals; indeed, most other courts to consider the effect of federal regulations

[6] See also 29 C.F.R. 1630.15(e) (recognizing defense "that a challenged action is required or necessitated by another Federal law or regulation").

on ADA claims have done so in the context of analyzing the employer's defenses, not in the context of ruling on the scope of the "regarded as" prong of the disability definition. See, *e.g.*, *Daugherty* v. *City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996); *Prado* v. *Continental Air Transp. Co.*, 982 F. Supp. 1304, 1307 (N.D. Ill. 1997); *Campbell* v. *Federal Express Corp.*, 918 F. Supp. 912, 920 (D. Md. 1996). On the other hand, especially if this Court were to hold that petitioner is not disabled (because mitigating measures should be taken into account), respondent ought not be permitted to preclude him from a broad class of jobs on account of his high blood pressure without being held to have "regarded" him as being disabled.[7] Thus, the two issues in this case are related, such that the Court may well benefit from the opportunity to construe the "actual disability" prong of the ADA's disability definition in the somewhat broader context provided by the "regarded as" prong of that same definition. Accordingly, although this issue would not independently warrant further review, the Court may wish to grant review with respect to this question if it determines to review the issue of mitigating measures.[8]

[7] DOT certification is required for "all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce," 49 C.F.R. 390.3(a), and an inability to obtain certification thus implicates "a class of jobs or a broad range of jobs in various classes." 29 C.F.R. 1630.2(j)(3)(i).

[8] If the Court grants the petition for a writ of certiorari in *Murphy*, it may help to focus the issues by rephrasing the questions presented as we have done in this brief.

CONCLUSION

The petition for a writ of certiorari in No. 97-1992 should be granted with respect to the first and fourth questions presented. The petition for a writ of certiorari in No. 97-1943 should be held pending this Court's disposition of No. 97-1992 and then disposed of accordingly.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

C. GREGORY STEWART
General Counsel

BILL LANN LEE
Acting Assistant Attorney General

PHILLIP B. SKLOVER
Associate General Counsel

BARBARA D. UNDERWOOD
Deputy Solicitor General

CAROLYN L. WHEELER
Assistant General Counsel

JAMES A. FELDMAN
Assistant to the Solicitor General

PAULA R. BRUNER
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

DECEMBER 1998

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 97-1943

In The

Supreme Court of the United States

October Term, 1998

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

JOINT APPENDIX

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
BROWNSTEIN HYATT FARBER
& STRICKLAND, P.C.
410 Seventeenth Street
22nd Floor
Denver, Colorado 80202
Telephone: (303) 534-6335
Attorneys for Respondent

VAN AARON HUGHES
Counsel of Record
TUCKER K. TRAUTMAN
KRISTIN L. WETENKAMP
IRELAND, STAPLETON, PRYOR
& PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700
Attorneys for Petitioners

[Additional Counsel Listed On Inside Cover]

Petition For Writ Filed June 3, 1998
Certiorari Granted January 8, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

80 PP

ROY T. ENGLERT, JR.
MAYER BROWN & PLATT
2000 Pennsylvania
Avenue N.W.
Washington, D.C. 20006
Telephone: (202) 463-2000
Attorneys for Respondent

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, Colorado 80020
Telephone: (303) 464-9409
Attorneys for Petitioners

TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
COMPLAINT (1/19/96)	3
MOTION TO DISMISS WITH PREJUDICE (2/29/96)	13
NOTICE OF AMENDED COMPLAINT (7/11/96)	14
AMENDED COMPLAINT (7/11/96)	17
DISTRICT COURT'S MEMORANDUM, OPINION AND ORDER (8/28/96)	30
TENTH CIRCUIT'S OPINION (11/26/97)	45
JUDGMENT (11/26/97)	75
ORDER DENYING REHEARING (3/3/98)	76

RELEVANT DOCKET ENTRIES

1/19/96	Complaint filed by Plaintiffs Karen Sutton and Kimberly Hinton
	* * *
2/29/96	Motion to Dismiss with Prejudice filed by Defendant United Air Lines, Inc.
2/29/96	Memorandum Brief by Defendant United Air Lines, Inc. in Support of Motion to Dismiss Action with Prejudice
	* * *
4/8/96	Brief by Plaintiffs Karen Sutton and Kimberly Hinton in Opposition to United Air Lines' Motion to Dismiss Action with Prejudice
	* * *
5/1/96	Reply by Defendant United Air Lines, Inc. in Support of Motion to Dismiss Action with Prejudice
	* * *
7/11/96	Notice by Plaintiffs Karen Sutton and Kimberly Hinton of Amended Complaint
7/11/96	Amended Complaint
	* * *
8/28/96	Memorandum Opinion and Order by Judge Daniel B. Sparr Granting United Air Lines' Motion to Dismiss Action with Prejudice
	* * *
9/27/96	Notice of Appeal
	* * *
11/26/97	Opinion filed by the Court of Appeals

12/18/97 Mandate from the Court of Appeals; Judgment dated 11/26/97 affirming the decision of the District Court on appeal

6/3/98 Petition for Writ of Certiorari filed

6/9/98 Notification from Court of Appeals regarding Petition for Writ of Certiorari filed in the United States Supreme Court on 6/3/98

1/8/99 Petition for Writ of Certiorari granted

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

vs.

UNITED AIRLINES, INC.,

Defendant.

COMPLAINT

(Filed Jan. 19, 1996)

Plaintiffs Kimberly Hinton and Karen Sutton allege as follows:

1. This is an action under the Americans with Disabilities Act by identical twin sisters, both experienced commercial pilots. The Plaintiffs desire to break down an illegal barrier that thwarts the realization of their life long goal to fly for a major air carrier. Each Plaintiff has painstakingly prepared for the job she seeks, and each possesses FAA medical approval to fly any class of passenger airplane. But, because of their uncorrected vision – which is 20-20 or better with corrective lenses – their applications were summarily rejected by the Defendant, United Airlines, Inc. ("Defendant" or "United").

PRELIMINARY ALLEGATIONS

2. Plaintiff Kimberly Hinton is an individual with a residence address of 6324 North Walnut Street, Spokane, Washington.

3. On or about December 3, 1992, Ms. Hinton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

4. Ms. Hinton has received a right to sue letter from the EEOC.

5. Plaintiff Karen Sutton is an individual with a residence address of 2903 North Regal, Spokane, Washington.

6. On or about December 16, 1992, Ms. Sutton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

7. Ms. Sutton has received a right to sue letter from the EEOC.

8. Defendant is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant also maintains a pilot training and hiring center in Denver, Colorado, known as the Denver Flight Center.

9. Defendant is an employer under relevant statutory law and employs more than 500 people.

10. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1331.

11. Venue is proper in this court pursuant to F.R.C.P. 98.

GENERAL ALLEGATIONS

12. Plaintiffs incorporate Paragraphs 1 through 11.

13. Ms. Hinton and Ms. Sutton are regional airline pilots. Ms. Sutton flies for Skywest Airlines and Ms. Hinton flies for CC Air, Inc., doing business as US Air Express.

14. Both Ms. Sutton and Ms. Hinton have a career objective to fly for a major airline. They have thoroughly prepared to accomplish that goal, gaining credentials and experience that far surpasses United's hiring standards.

15. United's Flight Officer Employment Application sets forth its required basic qualifications, including

A. Minimum age of 21

B. High school graduate

C. 350 hours of flight experience in fixed wing craft as pilot or co-pilot

D. FAA commercial pilot certificate with instrument rating

E. Second Class FAA medical certificate, with the ability to obtain first class certification

16. By way of comparison, in 1992 when Ms. Sutton and Ms. Hinton applied, each was 30 years of age. Each held a bachelor's degree with honors and Ms. Hinton also had an associate degree in Professional Flight. Each Plaintiff possessed (and still does) an airline transport pilot

license, which is more exacting and supersedes a commercial license. Ms. Sutton had over 1,700 flight hours as Pilot in Command, and over 3,400 total hours. Ms. Hinton had over 3,500 hours as Pilot in Command and over 4,700 total hours. Each possessed (and still does) a First-Class medical certificate from the Federal Aviation Administration, which indicates fitness to fly in any capacity, including that of airline captain.

17. The experience and qualifications of each Plaintiff have only increased since then.

Ms. Hinton's Application

18. In the years before the Americans with Disabilities Act took effect, Ms. Hinton twice applied for a pilot position with United. She applied once before the Act's passage, and again after it was enacted but before it took effect. Each time, her application was rejected because her uncorrected vision did not meet United's minimum standard. The rejections were painful and discouraging for someone who had worked so long and hard to become a pilot.

19. In October of 1992, after the ADA took effect, Ms. Hinton applied again. Soon after, she received a letter from United inviting her to travel to Denver to participate in flight simulator testing and interviews.

20. Ms. Hinton was elated. When she called the Flight Training Center to schedule the testing and interview, she commented to the United representative how pleased she was to have an interview in spite of United's

past policy concerning corrected vision. The representative wished her luck.

21. Preparing for the interview involved major effort, including gathering the personal documentation required by United and conducting training sessions and mock interviews with aviation consultants.

22. On the appointed day, Ms. Hinton performed the simulator test and was told by the evaluator: "congratulations, you did a very good job."

23. However, during her personal interview, a United screener asked Ms. Hinton if she was aware that her uncorrected vision did not comply with United's minimum requirements. The screener informed the United interviewer, who called Ms. Hinton away from her group of applicants and told her the company had made a "terrible, terrible mistake." He terminated the interview and dismissed her in front of the startled group.

24. United had learned of Ms. Hinton's uncorrected vision level simply by reading the United Application which she had submitted prior to being invited to interview. She had fully responded to the items requesting information on visual acuity.

25. United sent Ms. Hinton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

Ms. Sutton's Application

26. Ms. Sutton also had the dream of flying for a major airline. She watched the progress of her sister's

applications and shared in the disappointment of the first two rejections. Clearly, applying was futile.

27. The enactment of the Americans With Disabilities Act gave her hope that she could apply and be judged on her merits.

28. In November of 1992, after the ADA took effect, Ms. Sutton submitted an application for employment as a pilot. Soon after, she received a letter from United inviting her to travel to Denver to participate in interviews and flight simulator testing.

29. Ms. Sutton's invitation was thrilling, but as with Ms. Hinton and other serious applicants, also signalled the continuation of hard work to prepare for the interview.

30. Ms. Sutton's preparation – covering the period before and after the invitation – included approximately eight months of intensive study and review, passing a Flight Engineer written exam, training with an aviation consultant, and review of virtually every aviation situation and aircraft in her experience, all of which she managed to accomplish while working full time.

31. The last few weeks before the interview were particularly draining because Ms. Sutton learned that United had again disqualified her sister due to her vision. However, she decided to continue preparing unless notified otherwise by United.

32. The same harsh conclusion awaited. During Ms. Sutton's personal interview, (which in her case was randomly scheduled before the simulator test) United personnel asked Ms. Sutton if she was aware that her

uncorrected vision did not comply with United's minimum requirements. They told her that her invitation to interview was a mistake, and dismissed her.

33. United had learned of Ms. Sutton's uncorrected vision level simply by reading the application which she had previously submitted. She had fully responded to the application's questions about visual acuity and United invited her to interview even while it knew that she did not meet the requirement for uncorrected vision.

34. United sent Ms. Sutton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

ADA Violations

35. Plaintiffs are qualified for the positions for which they applied.

36. With the use of corrective lenses, each Plaintiff has vision that is 20/20 or better.

37. However, without corrective lenses or other "mitigating measures . . . or assistive or prosthetic devices," Ms. Sutton and Ms. Hinton are substantially limited in the major life activity of seeing.

38. With or without reasonable accommodation, Plaintiffs are able to perform the essential functions of the job for which they applied.

39. United rejected Plaintiffs on the basis of their disability, or because United regarded Plaintiffs as having a disability.

40. The EEOC has issued a Determination of Probable Violation of the Americans with Disabilities Act in the case of each Plaintiff.

41. The EEOC identified the following violations by United:

A. Requesting disability-related information in a job application;

B. Discriminating against a qualified individual on the basis of disability;

C. Failing to maintain separate files concerning disability related information;

D. Failing to keep required records when an applicant is rejected for not meeting the employer's qualifications.

42. On information and belief, United did not enter into meaningful conciliation efforts with the EEOC.

43. United Airline's refusal to hire Plaintiffs has caused them, and will continue to cause them, damages in an amount to be proven at trial.

CLAIM FOR RELIEF
(American with Disabilities Act)

44. Plaintiffs incorporate Paragraphs 1 through 43.

45. United's violations of the ADA, including its unlawful refusal to hire Plaintiffs, has caused them, and will continue to cause them, damages in an amount to be proven at trial, including back pay, front pay, and the economic value of lost hours of flight experience.

46. United has acted willfully and wantonly, or with reckless disregard for Plaintiffs' rights, entitling them to an award of punitive damages.

47. Pursuant to statute, Plaintiffs are entitled to injunctive relief, including an order forbidding United from applying unlawful criteria in future hiring and ordering United to instate plaintiffs in the positions they rightfully should hold and which reflect Plaintiffs' lost seniority and flight hours.

48. Pursuant to statute, if judgment enters in Plaintiffs' favor, Plaintiffs are entitled to an award of attorneys fees and costs.

WHEREFORE, Plaintiffs pray that the court find in their favor and against Defendant United Airlines, Inc., and that the court:

A. Enter judgment in favor of Plaintiffs and against Defendant for compensatory damages, including front pay, back pay, and the economic value of Plaintiffs' lost hours of flight experience;

B. Enter a permanent injunction enjoining Defendant from applying unlawful criteria in future hiring and ordering Defendant to instate Plaintiffs in the positions they rightfully should hold, including credit for Plaintiffs' lost seniority and flight hours, which order shall be binding upon Defendant, its officers, agents, servants, employees, and attorneys, and upon those persons in active concert with Defendant who receive actual notice of the order;

C. Enter judgment in favor of Plaintiffs and against Defendant for punitive damages;

D. Enter an order granting Plaintiffs their attorneys fees and costs; and

E. Grant such further relief as the court deems just and proper.

Respectfully submitted this 19th day of January, 1996.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues raised herein.

IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
Tucker K. Trautman
Shawn D. Mitchell

By: /s/ Shawn D. Mitchell
Attorneys for Plaintiffs Karen Sutton and Kimberly Hinton
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

Plaintiffs' addresses:

Kimberly Hinton
6324 North Walnut Street
Spokane, Washington 99207

Karen Sutton
2903 North Regal Street
Spokane, Washington 99207

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

v.

UNITED AIR LINES, INC.,

Defendant.

MOTION TO DISMISS PURSUANT TO
FED. R. CIV. PROC. 12(B)(6)

(Filed Feb. 29, 1996)

Defendant United Air Lines, Inc. ("United"), by and through its counsel Brownstein Hyatt Farber & Strickland P.C., hereby moves this Court for an order dismissing this action with prejudice pursuant to Fed. R. Civ. Proc. 12(b)(6) on the ground that plaintiffs have failed to state a claim upon which relief can be granted. In support of this motion, United submits its Memorandum Brief, filed simultaneously herewith.

DATED this 29th day of February, 1996.

BROWNSTEIN HYATT FARBER & STRICKLAND, P.C.

By: /s/ Lisa Hogan
Lisa Hogan
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 534-6335
ATTORNEYS FOR UNITED AIR LINES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

vs.

UNITED AIRLINES, INC.,

Defendant.

NOTICE OF AMENDED COMPLAINT

(Filed Jul. 11, 1996)

Pursuant to Fed. R. Civ. P. 15(a), Plaintiffs Karen Sutton and Kimberly Hinton file this Amended Complaint. In conjunction therewith, Plaintiffs state as follows:

1. In this action, Plaintiffs seek relief under the Americans With Disabilities Act because of Defendant's discriminatory policy. Defendant rejected Plaintiffs' applications for pilot positions on the basis of their disability.

2. As alleged in Plaintiffs' Complaint, Plaintiffs are extremely well qualified for the pilot positions that they seek. Plaintiffs have a disability, or Defendant regards them as having a disability, because each Plaintiff has uncorrected vision of 20/200 or worse in one eye and 20/400 or worse in the other. Defendant rejected Plaintiffs' applications based on their disability.

3. Defendant has filed a Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6), contending that Plaintiffs do not have a covered disability and that Defendant does not regard Plaintiffs as having a disability.

4. While the original Complaint adequately states a claim for relief, Plaintiffs have identified certain areas where clarification would be helpful to highlight the existence and extent of their impairment, as well as conduct by Defendant which demonstrates that it regards Plaintiffs as disabled. Plaintiffs have therefore prepared and filed the Amended Complaint.

Respectfully submitted this 11th day of July, 1996.

IRELAND, STAPLETON, PRYOR &
PASCOE, P.C.
Tucker K. Trautman
Shawn D. Mitchell

By: /s/ Shawn D. Mitchell
Attorneys for Plaintiffs Karen
Sutton and Kimberly Hinton
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

CERTIFICATE OF MAILING

I hereby certify that on July 11, 1996, a true and correct copy of the foregoing **NOTICE OF AMENDED COMPLAINT** was deposited in the United States Mail, postage prepaid, and addressed to the following:

Lisa Hogan, Esq.
Brownstein Hyatt Farber & Strickland, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202

/s/ Peggy G. Puckett

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,

Plaintiffs,

vs.

UNITED AIRLINES, INC.,

Defendant.

AMENDED COMPLAINT

Plaintiffs Kimberly Hinton and Karen Sutton allege as follows:

1. This is an action under the Americans with Disabilities Act by identical twin sisters, both experienced commercial pilots. The Plaintiffs desire to break down an illegal barrier that thwarts the realization of their life long goal to fly for a major air carrier. Each Plaintiff has painstakingly prepared for the job she seeks, and each possesses FAA medical approval to fly any class of passenger airplane. But, because of their uncorrected vision – which is 20/20 or better with corrective lenses – their applications were summarily rejected by the Defendant, United Airlines, Inc. ("Defendant" or "United").

PRELIMINARY ALLEGATIONS

2. Plaintiff Kimberly Hinton is an individual with a residence address of 6324 North Walnut Street, Spokane, Washington.

3. On or about December 3, 1992, Ms. Hinton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

4. Ms. Hinton has received a right to sue letter from the EEOC.

5. Plaintiff Karen Sutton is an individual with a residence address of 2903 North Regal, Spokane, Washington.

6. On or about December 16, 1992, Ms. Sutton filed with the EEOC a claim of discrimination based on disability that satisfied the requirements of 42 U.S.C. 2000(e). The charge was filed within 180 days after one or more of the alleged unlawful employment practices occurred.

7. Ms. Sutton has received a right to sue letter from the EEOC.

8. Defendant is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant also maintains a pilot training and hiring center in Denver, Colorado, known as the Denver Flight Center.

9. Defendant is an employer under relevant statutory law and employs more than 500 people.

10. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1331.

11. Venue is proper in this court pursuant to F.R.C.P. 98.

GENERAL ALLEGATIONS

12. Plaintiffs incorporate Paragraphs 1 through 11.

13. Ms. Hinton and Ms. Sutton are regional airline pilots. Ms. Sutton flies for Skywest Airlines and Ms. Hinton flies for CC Air, Inc., doing business as US Air Express.

14. Both Ms. Sutton and Ms. Hinton have a career objective to fly for a major airline. They have thoroughly prepared to accomplish that goal, gaining credentials and experience that far surpasses United's hiring standards.

15. United's Flight Officer Employment Application sets forth its required basic qualifications, including:

A. Minimum age of 21

B. High school graduate

C. 350 hours of flight experience in fixed wing craft as pilot or co-pilot

D. FAA commercial pilot certificate with instrument rating

E. Second Class FAA medical certificate, with the ability to obtain first class certification

16. By way of comparison, in 1992 when Ms. Sutton and Ms. Hinton applied, each was 30 years of age. Each held a bachelor's degree with honors and Ms. Hinton also had an associate degree in Professional Flight. Each Plaintiff possessed (and still does) an airline transport pilot license, which is more exacting and supersedes a commercial license. Ms. Sutton had over 1,700 flight hours as Pilot in Command, and over 3,400 total hours. Ms. Hinton had over 3,500 hours as Pilot in Command and over 4,700

total hours. Each possessed (and still does) a First-Class medical certificate from the Federal Aviation Administration, which indicates fitness to fly in any capacity, including that of airline captain.

17. The experience and qualifications of each Plaintiff have only increased since then.

Ms. Hinton's Application

18. In the years before the Americans with Disabilities Act took effect, Ms. Hinton twice applied for a pilot position with United. She applied once before the Act's passage, and again after it was enacted but before it took effect. Each time, her application was rejected because her uncorrected vision did not meet United's minimum standard. The rejections were painful and discouraging for someone who had worked so long and hard to become a pilot.

19. In October of 1992, after the AIDA took effect, Ms. Hinton applied again. Soon after, she received a letter from United inviting her to travel to Denver to participate in flight simulator testing and interviews.

20. Ms. Hinton was elated. When she called the Flight Training Center to schedule the testing and interview, she commented to the United representative how pleased she was to have an interview in spite of United's past policy concerning corrected vision. The representative wished her luck.

21. Preparing for the interview involved major effort, including gathering the personal documentation

required by United and conducting training sessions and mock interviews with aviation consultants.

22. On the appointed day, Ms. Hinton performed the simulator test and was told by the evaluator: "congratulations, you did a very good job."

23. However, during her personal interview, a United screener asked Ms. Hinton if she was aware that her uncorrected vision did not comply with United's minimum requirements. The screener informed the United interviewer, who called Ms. Hinton away from her group of applicants and told her the company had made a "terrible, terrible mistake." He terminated the interview and dismissed her in front of the startled group.

24. United had learned of Ms. Hinton's uncorrected vision level simply by reading the United Application which she had submitted prior to being invited to interview. She had fully responded to the items requesting information on visual acuity.

25. United sent Ms. Hinton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

Ms. Sutton's Application

26. Ms. Sutton also had the dream of flying for a major airline. She watched the progress of her sister's applications and shared in the disappointment of the first two rejections. Clearly, applying was futile.

27. The enactment of the Americans With Disabilities Act gave her hope that she could apply and be judged on her merits.

28. In November of 1992, after the ADA took effect, Ms. Sutton submitted an application for employment as a pilot. Soon after, she received a letter from United inviting her to travel to Denver to participate in interviews and flight simulator testing.

29. Ms. Sutton's invitation was thrilling, but as with Ms. Hinton and other serious applicants, also signalled the continuation of hard work to prepare for the interview.

30. Ms. Sutton's preparation – covering the period before and after the invitation – included approximately eight months of intensive study and review, passing a Flight Engineer written exam, training with an aviation consultant, and review of virtually every aviation situation and aircraft in her experience, all of which she managed to accomplish while working full time.

31. The last few weeks before the interview were particularly draining because Ms. Sutton learned that United had again disqualified her sister due to her vision. However, she decided to continue preparing unless notified otherwise by United.

32. The same harsh conclusion awaited. During Ms. Sutton's personal interview, (which in her case was randomly scheduled before the simulator test) United personnel asked Ms. Sutton if she was aware that her

uncorrected vision did not comply with United's minimum requirements. They told her that her invitation to interview was a mistake, and dismissed her.

33. United had learned of Ms. Sutton's uncorrected vision level simply by reading the application which she had previously submitted. She had fully responded to the application's questions about visual acuity and United invited her to interview even while it knew that she did not meet the requirement for uncorrected vision.

34. United sent Ms. Sutton a letter confirming that her uncorrected vision disqualified her from employment as a United pilot.

ADA Violations

35. Plaintiffs are qualified for the positions for which they applied.

36. With the use of corrective lenses, each Plaintiff has vision that is 20/20 or better.

37. However, without corrective lenses or other "mitigating measures . . . or assistive or prosthetic devices," Ms. Sutton and Ms. Hinton are substantially limited in the major life activity of seeing, as more fully described below:

a. Each Plaintiff has uncorrected vision of 20/200 or worse in her right eye and 20/400 or worse in her left eye.

b. A person with visual acuity of 20/200 can see an object from 20 feet only as well as an unimpaired person can see the same object from 200 feet. If the visual acuity is 20/400, then the

impaired individual standing 20 feet away sees the same image as the unimpaired individual does from 400 feet.

c. Corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification and also under the law of numerous states. Thus, Plaintiffs' uncorrected vision – their level of vision without regard to mitigating measures or corrective or assistive devices is equal to or lower than a level regarded as blind in numerous jurisdictions.

d. The impairment of each Plaintiff is substantial in that it is permanent; it results in constant reliance on mitigating measures or assistive devices; and without such measures, each Plaintiff effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores.

e. With corrective measures, however, Plaintiffs function identically to individuals without a similar impairment.

38. United regards Plaintiffs as having a substantially limiting impairment, as reflected in the following items:

a. United asserts that its requirement for uncorrected vision is a "rational, job-related, safety requirement." United thus believes that Plaintiffs' physical condition limits their ability to perform the type of work at issue here.

b. In actuality, the requirement has no demonstrable relationship to safety. The Federal Aviation Administration has determined, based on historical records and statistics, and based on

individual examination of each Plaintiff, that there is no safety concern regarding the physical capacity of each Plaintiff to perform the job they applied for.

c. To award a first class medical certificate, the FAA until recently applied individual scrutiny to applicants with uncorrected vision below 20/100. They were required to obtain a "Statement of Demonstrated Ability" and waiver of the uncorrected vision standard to qualify. However, the agency recently dropped the requirement because records and statistics over several decades show no difference of safety or performance between pilots with uncorrected vision better than 20/100 and pilots that received the waiver.

d. On information and belief, United has absolutely no data or evidence indicating that Plaintiffs' visual acuity and use of corrective lenses present safety concerns or have any effect on Plaintiffs' ability to perform the type of work at issue here. Instead, United's position is based on stereotype, myth, or unsubstantiated fears.

e. On information and belief, United's policy originally was modeled on military requirements for pilot training, without independent supporting basis. Over the years, United has relaxed its minimum standard from 20/20 to 20/70 and most recently to 20/100. On information and belief, each modification was without supporting medical evidence and was motivated primarily by market forces and competition for qualified pilot candidates.

f. United's policy blocks Plaintiffs from an entire class of employment: global airline pilot. United's policy is not limited to certain models

of aircraft, certain air routes, or certain flight conditions. It is a blanket prohibition without any supporting data or individualized consideration of either Plaintiff.

g. United's rejection of Plaintiffs is not based on an isolated mismatch between one employer and these applicants. There is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines. Nor is it related solely to one job with this employer. Rather, it blocks thousands of opportunities throughout the world.

h. At the time of Plaintiffs' applications and at present, other global carriers had similar or higher minimum standards, thus blocking Plaintiffs from seeking the same class of employment elsewhere in the industry.

39. United thus treats Plaintiffs' impairment as substantially limiting, whether it in fact is or not. And the attitude and policy of United toward Plaintiffs' condition is substantially limiting to Plaintiffs, whether their impairment in fact is or not.

40. With or without reasonable accommodation, Plaintiffs are able to perform the essential functions of the job for which they applied.

41. United rejected Plaintiffs on the basis of their disability, or because United regarded Plaintiffs as having a disability.

42. The EEOC has issued a Determination of Probable Violation of the Americans with Disabilities Act in the case of each Plaintiff.

43. The EEOC identified the following violations by United:

a. Requesting disability-related information in a job application;

b. Discriminating against a qualified individual on the basis of disability;

c. Failing to maintain separate files concerning disability related information;

d. Failing to keep required records when an applicant is rejected for not meeting the employer's qualifications.

44. On information and belief, United did not enter into meaningful conciliation efforts with the EEOC.

45. United Airline's refusal to hire Plaintiffs has caused them, and will continue to cause them, damages in an amount to be proven at trial.

CLAIM FOR RELIEF
(American with Disabilities Act)

46. Plaintiffs incorporate Paragraphs 1 through 45.

47. United's violations of the ADA, including its unlawful refusal to hire Plaintiffs, has caused them, and will continue to cause them, damages in an amount to be proven at trial, including back pay, front pay, and the economic value of lost hours of flight experience.

48. United has acted willfully and wantonly, or with reckless disregard for Plaintiffs' rights, entitling them to an award of punitive damages.

49. Pursuant to statute, Plaintiffs are entitled to injunctive relief, including an order forbidding United from applying unlawful criteria in future hiring and ordering United to instate plaintiffs in the positions they rightfully should hold and which reflect Plaintiffs' lost seniority and flight hours.

50. Pursuant to statute, if judgment enters in Plaintiffs' favor, Plaintiffs are entitled to an award of attorneys fees and costs.

WHEREFORE, Plaintiffs pray that the court find in their favor and against Defendant United Airlines, Inc., and that the court:

A. Enter judgment in favor of Plaintiffs and against Defendant for compensatory damages, including front pay, back pay, and the economic value of Plaintiffs' lost hours of flight experience;

B. Enter a permanent injunction enjoining Defendant from applying unlawful criteria in future hiring and ordering Defendant to instate Plaintiffs in the positions they rightfully should hold, including credit for Plaintiffs' lost seniority and flight hours, which order shall be binding upon Defendant, its officers, agents, servants, employees, and attorneys, and upon those persons in active concert with Defendant who receive actual notice of the order;

C. Enter judgment in favor of Plaintiffs and against Defendant for punitive damages;

D. Enter an order granting Plaintiffs their attorneys fees and costs; and

E. Grant such further relief as the court deems just and proper.

Respectfully submitted this 11th day of July, 1996.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues raised herein.

IRELAND, STAPLETON, PRYOR
& PASCOE, P.C.
Tucker K. Trautman
Shawn D. Mitchell

By: _____
Attorneys for Karen Sutton and
Kimberly Hinton
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

Plaintiffs' addresses:

Kimberly Hinton
6324 North Walnut Street
Spokane, Washington 99207

Karen Sutton
2903 North Regal Street
Spokane, Washington 99207

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 96-S-121

KAREN SUTTON and KIMBERLY HINTON,
Plaintiffs,

v.

UNITED AIRLINES, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Aug. 28, 1996)

THIS MATTER comes before the court on the Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (filed February 29, 1996). The court has reviewed the motion, the Plaintiffs' opposition (filed April 8, 1996), the Defendant's reply (filed May 1, 1996), the Amended Complaint (filed July 18, 1996), and the applicable law and is fully advised in the premises.

1. Standard of Review

In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a district court's role is to assess the legal feasibility of the complaint; it is not to weigh the evidence which might be offered at trial. In considering the legal feasibility of the complaint, a court may only consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters of which judicial notice may be taken. *Samuels v.*

Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993). Applying Fed. R. Civ. P. 12(b)(6), a court should not dismiss a cause of action for failure to state a claim unless the court determines that the plaintiff can prove no set of facts that would entitle it to relief, even when all well-pleaded allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528-29 (10th Cir. 1992); *Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n.*, 908 F.2d 578, 582 (10th Cir. 1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1148 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). So long as the plaintiff can offer evidence in support of a legally recognized claim for relief, a motion to dismiss must be denied. *Hiatt v. Schreiber*, 599 F.Supp. 1142, 1145 (D. Colo. 1984).

2. The Plaintiffs' Claim

The Plaintiffs' Amended Complaint alleges a single claim for violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, ("the ADA"). Plaintiffs are twin sisters who are currently employed as commercial airline pilots. Plaintiffs have applied to Defendant United for employment as passenger airline pilots, but have been rejected for such employment because they do not meet United's minimum uncorrected vision requirements. United requires its passenger airline pilots to have uncorrected vision of 20/100 or better. Each Plaintiff has uncorrected vision of 20/200 or worse in her right eye and

20/400 or worse in her left eye.[1] Plaintiffs claim that they are qualified for the positions for which they applied because, with corrective lenses, they have vision that is 20/20 or better. Plaintiffs allege United is violating the ADA by rejecting them on the basis of a disability or because United regards them as having a disability.

3. Statutory Framework

The ADA forbids discrimination:

> against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1996). In order to state a claim under the ADA, a plaintiff must establish:

> (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and

[1] A person with visual acuity of 20/200 can see an object from 20 feet only as well as an unimpaired person can see the same object from 200 feet. If the visual acuity is 20/400, then the impaired individual standing 20 feet away sees the same image as the unimpaired person sees from 400 feet. Corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification. (Amended Complaint paragraphs 37. b. and c.)

> (3) that the employer terminated him because of his disability.

Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995), quoting *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).[2]

The court must begin by determining whether Plaintiffs are disabled as defined by the ADA. The ADA defines "disability" using three alternatives:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1996). *See also Bolton*, 36 F.3d at 942. Plaintiffs argue that they are disabled and additionally that United regarded them as being disabled. United argues that the Plaintiffs are not disabled because they have no impairment which substantially limits any major life activities. Plaintiffs claim they are, and United regards them as being, substantially limited in the major

[2] The language adopted in the ADA tracks that of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* The ADA expressly requires its provisions to be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements" under the two statutes. 42 U.S.C. § 12117(b). Congress intended relevant caselaw developed under the Rehabilitation Act to be generally applicable to analogous inquiries under the ADA. *White*, 45 F.3d at 360; *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 942-43 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1104 (1995); House Report No. 101-485(I) p. 50, *reprinted in* 1990 U.S.C.C.A.N. 332.

life activity of seeing (Amended Complaint paragraphs 37, 38; Plaintiffs' opposition brief pp. 2, 3, 6 n. 2, 12).

Although the ADA does not define "physical impairment," "substantially limits," "major life activities," or "being regarded as having such an impairment," the regulations promulgated by the Equal Employment Opportunity Commission (EEOC) pursuant to the ADA provide significant guidance. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190 (5th Cir. 1996) (citation omitted). The regulations define "physical impairment" to include:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; . . .

29 C.F.R. § 1630.2(h)(1) (1996).

> "Major life activities" means:
>
> functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i). The appendix to the regulations provides that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. Pt. 1630, Appendix to Part 1630 – Interpretive Guidance to Title I of the ADA, § 1630.2(i) (1996).

> The term "substantially limited" means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Whether an individual is substantially limited in a major life activity is determined in light of:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

"Being regarded as having such an impairment means:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward impairment; or

> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having substantially limiting impairment.

29 C.F.R. § 1630.2(l).

4. Analysis

The issue is whether the Plaintiffs' impairment substantially limits any of their major life activities or whether United regards the Plaintiffs as having such an impairment, such that they are disabled as defined by the ADA. The court must consider the extent to which their impairment restricts their specific activities. EEOC Compliance Manual § 902.4(a) (1995). Obviously, the Plaintiffs' ability to see without correction is affected, but, as reflected in the statute and regulations, far more is required to trigger coverage under 42 U.S.C. § 12102(2)(A) and (C).

First, Plaintiffs do not claim any restrictions on their activities other than their inability to obtain employment as passenger airline pilots for United. Plaintiffs do not allege that they have any medical restrictions. Plaintiffs do not allege any activity that they are unable to perform that the average person in the general population can perform, nor do they state that they suffer from any significant restrictions in any activities as compared to the average person. *See* 29 C.F.R. § 1630.2(l)(i) and (ii). Indeed, they are currently employed as commercial airline pilots. Plaintiffs concede that, with their corrective lenses, they are able to function identically to individuals

without a similar impairment. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors in 29 C.F.R. § 1630.2(j)(2), does not amount to a significant restriction when compared with the abilities of the average person. 29 C.F.R. Pt. 1630 App. § 1630.2(j).

Second, numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities. *Roth v. Lutheran Gen'l Hosp.*, 57 F.3d 1446, 1454-56 (7th Cir. 1995) (doctor with strabismus (crossed eyes) was not disabled because he could read, write, lecture, and successfully complete graduate school); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir.), *reh'g denied*, 9 F.3d 105 (1993), *cert. denied*, 114 S.Ct. 1386 (1994) (vision correctable to 20/200 is not a "handicap" under the Rehabilitation Act); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248-50 (6th Cir. 1985) (plaintiff with crossed eyes who had difficulty operating mail-sorting machine but who otherwise was not limited in work or recreation was not "handicapped" under the Rehabilitation Act); *Venclauskas v. Connecticut Dept. of Pub. Safety*, 921 F.Supp. 78, 80-82 (D.Conn. 1995) (applicant for state police trooper trainee who was rejected for failure to meet unaided visual acuity standard failed to state a claim under the ADA or the Rehabilitation Act); *Joyce v. Suffolk County*, 911 F.Supp. 92, 96 (E.D. New York 1996) (candidate for county police officer position who failed to meet visual acuity standard because his uncorrected vision in each eye was 20/200 but his corrected vision in each eye was 20/20 was not "handicapped" or "disabled" under the ADA or the Rehabilitation Act); *Walker v. Aberdeen-Monroe County*

Hosp., 838 F.Supp. 285, 288 (N.D. Miss. 1993) (a person whose vision is corrected to 20/30 is not "handicapped" within the meaning of the Rehabilitation Act); *Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, 5 A.D. Cases 853 (S.D.N.Y. April 26, 1996) (plaintiff's diminished vision in one eye did not qualify as a "disability" because it did not substantially limit his ability to participate in any major life activity). Even accepting all of the Plaintiffs' allegations as true, Plaintiffs have not stated a claim that they are substantially limited in the major life activity of seeing.

Third, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working. EEOC Compliance Manual § 902.4(c). With respect to the major life activity of working, the term "substantially limits" means:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. *The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.*

29 C.F.R. § 1630.2(j)(3) (1996) (emphasis added). The major life activity of working does not necessarily mean

working at the job of one's choice. *Bolton*, 36 F.3d at 942, citing *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir. 1992); *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088, 1099 (D.Hawaii 1980). In addition to the factors listed in 29 C.F.R. § 1630.2(j)(2), the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working:"

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii) (1996).

The Plaintiffs' entire complaint is based on their inability to obtain the single, particular job of passenger airline pilot with United. Plaintiffs are currently employed as commercial airline pilots, jobs that utilize training, knowledge, skills, and abilities similar to the job of passenger airline pilot. Under the statutory factors to be considered by the court, it is clear that the Plaintiffs cannot state a claim that they are substantially limited in

the major life activity of working. The Plaintiffs' common moderate vision impairment, although certainly an undesirable inconvenience, does not substantially limit their ability to work within the meaning of the ADA.

Plaintiffs argue that the ADA regulations require that the existence of a disability be determined without regard to the effects of mitigating measures such as drugs or prosthesis, citing 29 C.F.R. Pt. 1630, App. § 1630.2(h). The court recognizes that App. § 1630.2(j) provides that "[the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630, App. § 1630.2(j); EEOC Compliance Manual § 902.4(c)(1). However, the part of the EEOC's interpretation of the regulations that Plaintiffs rely upon addresses impairment, not disability, stating that the existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. Even if the Plaintiffs' uncorrected vision would be considered an impairment, a physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA because the statute requires an impairment that substantially limits one or more of the major life activities. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995). If the impairment does not significantly restrict a major life activity, then the impairment is not a disability. EEOC Compliance Manual § 902.4(c)(1).

Fourth, it is apparent that the ADA was intended to protect only a limited class of persons; specifically, individuals who suffer from impairments significantly more severe than those encountered by the average person in

everyday life, not people who suffer from slight shortcomings that are both minor and widely shared. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986); *Buko v. American Medical Laboratories, Inc.*, 830 F.Supp. 899, 904 (E.D.Va. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994). An excerpt from the legislative history of the ADA reveals that the type of visual impairment contemplated by the legislation is of a degree beyond that correctable by eyeglasses or contact lenses:

> For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [sic] visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

House Report No. 101-485(II) p. 64, *reprinted in* 1990 U.S.C.C.A.N. 346. To adopt a definition of "disabled" that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA. Millions of Americans suffer visual impairments no less serious than those of the Plaintiffs. Under such an expansive reading, the term "disabled" would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect.

Fifth, Plaintiffs cannot state a claim that United "regarded" them as being disabled. There is no support for the allegation that United, based on stereotype, myth, or unsubstantiated fears, regarded Plaintiffs as substantially impaired in the major life activity of seeing. As for the major life activity of working, the proper test for a

"regarded as" claim is whether the impairment, as perceived, would affect the individual's ability to find work across the spectrum of same or similar jobs. *Muller v. Automobile Club of Southern California*, 897 F.Supp. 1289, 1297 (S.D. Calif. 1995) (citation omitted); *Venclauskas*, 1995 WL 819137 at *3-4 (citations omitted). An employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 933-34. An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on the employee's ability to work in general. *Hutchinson v. United Parcel Service, Inc.*, 883 F.Supp. 379, 396 (N.D.Iowa 1995). The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 934; EEOC Compliance Manual § 902.8(f).

At most, the Plaintiffs can establish that United regarded them as unable to satisfy the requirements of a particular passenger airline pilot position. The Plaintiffs have had no difficulty obtaining other jobs in their field prior to this one. Plaintiffs are currently employed as commercial airline pilots. The need for corrective eyewear in no way substantially limits the Plaintiffs' employment generally. *Joyce*, 911 F.Supp. at 96.

Finally, the Plaintiffs indicate that United's visual acuity standards are based on its "misunderstanding" of

certain government regulations. However, the ADA does not require United to lower or effect substantial modifications of its standards to accommodate disabled persons. *See Southeastern Community College v. Davis*, 442 U.S. 397, 413-14 (1979). Even if the Plaintiffs were disabled within the meaning of the statute, the ADA does not authorize the court to compel the airlines to alter the qualifications for passenger airline pilots.

The court concludes that the Plaintiffs cannot state a claim that United regarded them as impaired in a way that substantially limits a major life activity and, therefore, cannot state a claim that they are disabled under the ADA.

5. Conclusion

Even after accepting all factual allegations as true and drawing all reasonable inferences in favor of the Plaintiffs, the court concludes that the Plaintiffs cannot state a claim under the ADA. Plaintiffs do not support their claim with facts that would prove that they are disabled under the ADA, and therefore, that they are entitled to any relief under the ADA.

Accordingly, IT IS ORDERED:

1. The Defendant's Motion to Dismiss is GRANTED.

2. This civil action is DISMISSED.

3. Upon the filing of a bill of costs with the Clerk of the Court, the Defendant shall be entitled to recover from the Plaintiffs its costs in this action.

DATED at Denver, Colorado, this 28th day of August, 1996.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
United States
District Judge

Case No. 96-S-121

CERTIFICATE OF MAILING

I hereby certify that a copy of the MEMORANDUM OPINION AND ORDER signed by Judge Daniel B. Sparr and filed on August 28, 1996 was mailed on August 29, 1996 to the following:

Tucker K. Trautman, Esq.
Shawn D. Mitchell, Esq.
Ireland, Stapleton, Pryor &
Pascoe, P.C.
DC BOX 08

Lisa Hogan, Esq.
Brownstein Hyatt Farber &
Strickland, P.C.
410 – 17th Street, 22nd Floor
Denver, CO 80202

Magistrate Judge Bruce D. Pringle

/s/ Judy L. Poor
Secretary/Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KAREN SUTTON and KIMBERLY HINTON,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 96-1481
UNITED AIR LINES, INC.,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 96-S-121)

(Filed Nov. 26, 1997)

Lisa Hogan (Patrick F. Carrigan and Beth A. Doherty Quinn with her on the brief) of Brownstein, Hyatt, Farber & Strickland, Denver, CO, for appellee.

Shawn D. Mitchell of Ireland, Stapleton, Pryor & Pascoe, Denver, CO, for appellants.

Before **BRORBY, BARRETT, and McKAY** Circuit Judges.

BARRETT, Senior Circuit Judge.

Karen Sutton and Kimberly Hinton (collectively referred to as Plaintiffs) appeal the district court's

dismissal of their Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., discrimination claims for failure to state a claim upon which relief may be granted. *See Sutton v. United Airlines, Inc.*, No. 96-S-121, 1996 WL 588917 (D.Colo. Aug. 28, 1996). For the following reasons, we affirm.

Background

Plaintiffs, who are twin sisters, are currently commercial airline pilots for regional commuter airlines. However, they share a "life long goal to fly for a major air carrier." In 1992, Plaintiffs applied for commercial airline pilot positions with United Air Lines, Inc. (United) and were invited to interview in Denver, Colorado. At their interviews, Plaintiffs were informed that their uncorrected vision disqualified them from pilot positions with United, in that applicants for pilot positions must have uncorrected vision of 20/100 or better in each eye. Plaintiffs' uncorrected vision is 20/200 in the right eye and 20/400 in the left eye.[1] Plaintiffs' corrected vision is 20/20 in both eyes.

Plaintiffs Amended Complaint, filed pursuant to the ADA, alleged that United discriminated against them in the hiring process by rejecting their applications because of their "disability," their uncorrected vision, and/or because United regarded them as disabled. Plaintiffs asserted they are disabled under the ADA because their

[1] A person with visual acuity of 20/200 can see an object from 20 feet only as well as a person with 20/20 vision can see an object at 200 feet.

uncorrected vision substantially limits their major life activity of seeing. They averred their vision limitations are permanent and that without corrective measures, they would "effectively be unable to see" well enough to conduct normal everyday activities such as driving, watching television, or shopping. In addition, Plaintiffs alleged United regarded them as disabled in violation of the ADA because United's policy of requiring uncorrected vision of 20/100 or better blocks Plaintiffs from an entire class of employment, global airline pilots, without any objective evidence of job relatedness or safety.

On August 28, 1996, the district court granted United's motion to dismiss. The court concluded that Plaintiffs' Amended Complaint failed to state a claim under the ADA. The district court ruled that Plaintiffs were not disabled within the meaning of the ADA because their vision did not substantially limit a major life activity. The court stated that with corrective measures Plaintiffs' were "able to function identically to individuals without a similar impairment" and as such Plaintiffs were not substantially limited in the major life activity of seeing. Sutton, 1996 WL 588917, at *3. The court reasoned that "[t]o adopt a definition of 'disabled' that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA. Millions of Americans suffer visual impairments no less serious that those of the Plaintiffs. Under such an expansive reading, the term 'disabled' would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect." *Id.* at *5. With respect to Plaintiffs' claim that

United regarded them as disabled in violation of the ADA, the district court found no support for Plaintiffs' allegation that United regarded them as substantially impaired in the major life activity of seeing based on stereotype, myth, or unsubstantiated fears. *Id.* At best, the court reasoned that Plaintiffs established that United regarded them as "unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at *6.

On appeal, Plaintiffs contend the district court erred in dismissing their Amended Complaint for failure to state a claim under the ADA. Plaintiffs assert that they alleged sufficient facts to establish that: (1) they were qualified applicants with a disability because they are substantially limited in the major life activity of seeing, and (2) United regarded them as having a substantially limiting impairment because its policy deprives them of employment throughout the global air carrier industry with no rational job-related basis. Plaintiffs argue that the district court erred in evaluating their physical impairment, their vision, with the benefit of corrective measures, in direct contradiction to the Equal Employment Opportunity Commission's (EEOC) Interpretive Guidance, which provides that the determination of whether an individual has a physical impairment and whether an individual is disabled within the meaning of the ADA must be done without regard to mitigating or corrective measures.

United responds that Plaintiffs' vision does not constitute a "physical or mental impairment" within the meaning of the ADA and that, even if it does, it does not "substantially limit" a major life activity. First, United contends that a minor, relatively common condition, such

as Plaintiffs' nearsightedness and subsequent need for glasses, is not an impairment under the ADA. Second, United asserts that even if Plaintiffs are impaired within the meaning of the ADA, the EEOC's Interpretive Guidance, stating that disability determinations be made without regard to mitigating or corrective measures, is in direct conflict with the ADA's statutory requirement that a disability be a physical or mental impairment that "substantially limit[s] one or more of the major life activities of such individual." *See* 42 U.S.C. § 12101(2). United argues that to evaluate a disability without regard to mitigating measures would read out the ADA's statutory requirement that the impairment be "substantially" limiting. United reasons that if an individual can utilize corrective measures to mitigate the effects of an impairment to a degree such that there is no substantial limitation on a major life activity, then the individual is not disabled within the meaning of the ADA. Finally, United asserts that Plaintiffs can offer no substantive evidence it regarded them as anything other than as unable to meet the rational job-related safety requirements of the jobs they sought.

We review the district court's dismissal of a complaint for failure to state a claim upon which relief may be granted de novo. *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army,* 111 F.3d 1485, 1490 (10th Cir.1997). " 'We uphold a dismissal under Fed.R.Civ.P. 12(b)(6) only when it appears that the plaintiff[s] can prove no set of facts in support of the claims that would entitle [them] to relief, accepting all well-pleaded allegations of the complaint as true and construing them in the

light most favorable to the plaintiff[s].' " *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir.) (*quoting Fuller v. Norton*, 86 F.3d 1016, 1020 (10th Cir.1996)), *cert. denied*, ___ U.S. ___, 118 S.Ct. 55, ___ L.Ed.2d ___ (1997). With this standard in mind, we turn to Plaintiffs' ADA claims.

Discussion

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[2] 42 U.S.C. § 12112(a). *See Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir.1994) (*quoting* 42 U.S.C. § 12112(a)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such

[2] In this analysis, we rely on cases interpreting both the ADA and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., because the standards are largely the same. *See Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir.1997) (concluding "cases construing one statute are instructive in construing the other"); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 n. 2 (8th Cir.1995) ("cases interpreting either [ADA or Rehabilitation Act] will be instructive for this analysis" of the ADA); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir.1994) (" 'Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA.' ") (*quoting* 29 C.F.R. § 1630, App. § 1630.2(g)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995).

individual holds or desires." 42 U.S.C. § 12111(8). *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir.1995) (*quoting* 42 U.S.C. § 12111(8)).

To establish a claim under the ADA, Plaintiffs must demonstrate that: (1) they are disabled persons within the meaning of the ADA; (2) they are qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation (which they must describe); and (3) United discriminated against them in its employment decision (the job application procedure and/or hiring process) because of their alleged disability. *See Siemon v. AT&T Corp.*, 117 F.3d 1173, 1175 (10th Cir.1997); *White*, 45 F.3d at 360-61.

Taking all Plaintiffs' allegations in their Amended Complaint as true, as we must, Plaintiffs have established they are "qualified" for the position of commercial airline pilot and that United refused to continue their interviews (or hire them) due to their alleged disability, their uncorrected vision. Plaintiffs are both commercial airline pilots with regional commuter airlines; each holds an airline transport pilot license, which supersedes United's requirement for a commercial license; each has recorded thousands of hours of flight time as Pilot in Command; and each has a First-Class medical certificate from the Federal Aviation Administration (FAA). Additionally, United sent each plaintiff a letter confirming that her uncorrected vision, each plaintiff's alleged disability, disqualified her from employment as a United pilot. Thus, at issue in this case, is whether Plaintiffs' vision qualifies them as "individuals with a disability" within the meaning of the ADA.

The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The statutory requirement that disability determinations be made "with respect to the individual," contemplates an individualized, and case-by-case determination of whether a given impairment substantially limits a major life activity of the individual. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 166 (4th Cir.1997) (*en banc*) (*citing Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir.1995) (collecting cases holding that a finding of disability must be made on a case-by-case basis)). *See also Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir.1996) (holding that "a determination of disability must be made on an individualized, case-by-case basis"); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir.1996) (same); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir.1996) (applying factors in an individualized manner).

Here, Plaintiffs allege they are "disabled" within the meaning of the subparagraphs (A) and (C) because their uncorrected vision is a physical impairment that substantially limits their major life activity of seeing and United regarded them as having a substantially limiting impairment when it disqualified them from all airline pilot positions. We address each of Plaintiffs' contentions in turn.

I. 42 U.S.C. § 12102(2)(A) – Actual Disability

Subparagraph (A) defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual. 42 U.S.C. § 12102(2)(A). Therefore, to qualify as having a "disability" pursuant to subparagraph (A), Plaintiffs must establish (1) that their vision is a "physical or mental impairment;" and (2) if their vision is an impairment, that it "substantially limits one or more of the[ir] major life activities." *See id.*

1. Physical or Mental Impairment

Plaintiffs must establish that their vision is a "physical or mental impairment." *See id.* The ADA does not define a "physical or mental impairment." Hence, we are confronted with a question of statutory interpretation. Our inquiry begins with an examination of the language of the statute itself. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir.1997). " 'When the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances.' " *Id.* (*quoting United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir.1991), *cert. denied*, 503 U.S. 984, 112 S.Ct. 1667, 118 L.Ed.2d 388 (1992) (quotation omitted)). In addition, "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 2054, 124 L.Ed.2d 138 (1993). "[C]ommon and ordinary usage may be obtained by reference to a dictionary." *United States v. Roberts*, 88 F.3d 872, 877 (10th Cir.1996).

The term "impairment" is not defined by the statute. However, the statute does require that the impairment "substantially limit" a major life activity. *See* 42 U.S.C. § 12102(2)(A). Thus, the impairment must be significant, and not merely trivial. *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1417 (10th Cir.1992). *See also Runnebaum*, 123 F.3d at 167 ("Because the impairment must impose a 'substantial limitation' on 'one or more of the major life activities,' the impairment must be significant, not merely trivial."); *Byrne v. Board of Educ., Sch. of West Allis-West Milwaukee*, 979 F.2d 560, 564 (7th Cir.1992) ("The statute's inclusion of the limiting adjectives 'substantial' and 'major' emphasizes that the impairment must be a significant one."); *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir.1986) (concluding that "[t]he statutory language, requiring a substantial limitation of a major life activity, emphasizes that the impairment must be a significant one"). In addition, Webster's Dictionary defines "impair" as "to make worse by or as if by diminishing in some material respect." Webster's Ninth New Collegiate Dictionary 574 (1984). *See also* Black's Law Dictionary 677 (5th ed. 1981) ("To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner."); Ballentine's Law Dictionary 584 (3d ed. 1969) ("To make worse; to diminish in quality, value, excellence, or strength; to deteriorate.").

We are also guided by the definition promulgated by the EEOC in its regulations issued to implement Title 1 of the ADA. *See* 29 C.F.R. § 1630.1(a); 42 U.S.C. § 12116 (requiring the EEOC to issue regulations to implement Title 1 of the ADA). The regulations define a "physical or mental impairment" as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h).

To further assist in the interpretation of the ADA, the EEOC published an Interpretive Guidance on Title I of the Americans with Disabilities Act. 29 C.F.R. § 1630, App. Under the EEOC's Interpretative Guidance, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[3] 29 C.F.R. § 1630, App. § 1630.2(h) para. 2.

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[3] It is well established that we must defer to the EEOC's regulatory definition unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). However, although we give great deference to the EEOC's interpretation of the ADA found in the regulations promulgated under the express authority of Congress and the ADA itself, we do not do the same for interpretative guidance promulgated under the Administrative Procedure Act. *See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir.1994) (no special deference due to Department of Labor comment, which is a "purely interpretive rule") (*citing Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04, 99 S.Ct. 1705, 1717-19, 60 L.Ed.2d 208 (1979) (explaining distinction between

Accordingly, we must determine whether Plaintiffs' vision makes worse or diminishes in a material or significant respect any of the enumerated body systems. *See* 29 C.F.R. § 1630.2(h). We will evaluate Plaintiffs' vision in the uncorrected state, without the benefit of mitigating or corrective measures, because the EEOC's Interpretive Guidance is reasonable and consistent with the statutory mandates themselves. The fact that a disorder or condition may be mitigated or correctable does not affect the underlying nature of the disorder or condition. If the underlying disorder or condition makes worse or diminishes in a material respect any of the enumerated body systems of the individual, then it should be considered an "impairment," regardless of whether the individual compensates for this worsening or diminishment by corrective measures. *See Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir.1995) (concluding impairment determination made without regard to mitigating measures).

In addition, "[i]t is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments." 29 C.F.R. § 1630, App. § 1630.2(h) para. 3. Hence, impairment does not include: physical characteristics such as eye color, hair color, left-handedness, height, weight, or muscle tone that are within the "normal" range and are not the result of a

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interpretative rules and substantive or legislative rules)). Hence, while the EEOC's Interpretive Guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference under *Chevron*.

physiological disorder; characteristic predisposition to illness or disease; pregnancy; common personality traits such as poor judgment or quick temper where these are not the symptoms of a mental or psychological disorder; or environmental, cultural or economic disadvantages such as poverty, lack of education or a prison record. *Id. See Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir.1997) (holding physical characteristics of excessive weight and lack of cardio-respiratory endurance and strength not impairments under the ADA); *Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir.1989) (holding in Rehabilitation Act case that personality traits of "poor judgment, irresponsible behavior and poor impulse control" could be described as commonplace and "in no way r[ose] to the level of an impairment"); *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (C.D.Cal.1984) (finding body builder's "unique musculoskelital [sic] system and body composition" not an impairment because it is not the result of a "physiological disorder[ ]," "cosmetic disfigurement," or "anatomical loss"); *Trembczsynski v. City of Calumet City*, No. 87-C-0961, 1987 WL 16604 (N.D.Ill. Aug.31, 1987) ("Being slightly myopic [20/40 uncorrected vision] is a physical characteristic, not . . . an 'impairment' as contemplated by the [Rehabilitation] Act."). *Compare Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 23 (1st Cir.1993) (concluding "morbid obesity" may be physical impairment).

Plaintiffs averred that their uncorrected vision prevents them from engaging in normal everyday activities, such as, driving, watching television, and shopping. After careful consideration, we hold that Plaintiffs' averments are sufficient to establish that their uncorrected vision of

20/200, in the right eye, and 20/400, in the left eye, makes worse or diminishes the eyes, the special sense organ of sight, compared to a normal person with 20/20 vision.[4] Therefore, for the purposes of the motion to dismiss, Plaintiffs established their vision is a physical impairment within the meaning of the ADA.

2. "Substantially Limits" A "Major Life Activity"

Plaintiffs must also establish that their physical impairment, their vision, "substantially limits one or more of the[ir] major life activities." *See* 42 U.S.C. § 12102(2)(A). The ADA does not define either "substantially limits" or "major life activity." Therefore, we are again confronted with questions of statutory interpretation.

We begin our analysis with the term "major life activity." While the statute itself does not define a "major life activity," the ADA regulations adopt the definition found in the Rehabilitation Act regulations, 34 C.F.R. § 104. *Bolton*, 36 F.3d at 942. As defined, a "major life activity" includes, but is not limited to, "functions such as caring

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[4] It could be argued that by definition uncorrected vision of 20/200 and 20/400 makes worse or diminishes in a material respect the eyes on any individual creating a per se impairment. However, we do not espouse or endorse any per se impairments or disabilities. As noted supra, the ADA's use of individualized language requires courts to make case-by-case impairment and disability determinations. *See Runnebaum*, 123 F.3d at 169 (determination of whether individual with asymptomatic HIV is impaired or disabled must be made on individualized case-by-case basis).

for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). *See MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1444 (10th Cir.1996) (adopting regulation's definition of "major life activities") (*quoting* 29 C.F.R. § 1630.2(i)); *Lowe*, 87 F.3d at 1173 (including sitting, standing, lifting and reaching from 29 C.F.R. § 1630, App. § 1630.2(i)).

In their Amended Complaint, Plaintiffs alleged they are substantially limited in the major life activity of seeing. Inasmuch as seeing is expressly included in the EEOC's definition of major life activities, which has been previously adopted by this court, we do not decide what other activities may qualify and we now turn to consider whether Plaintiffs' physical impairment "substantially limits" their major life activity of seeing.

Pursuant to the ADA regulations, in order for a physical or mental impairment to be "substantially limiting," the individual must be:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

In determining whether an individual is substantially limited in a major life activity, the following three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2). *See MacDonald*, 94 F.3d at 1444 (*quoting* 29 C.F.R. § 1630.2(j)(2)); *Lowe*, 87 F.3d at 1173 (same); *Bolton*, 36 F.3d at 943 (same).

Thus, in order to establish that they are substantially limited in the major life activity of seeing, Plaintiffs must establish that they are unable to see or are significantly restricted as to the condition, manner, or duration of their ability to see as compared to the average person in the general population, taking into consideration the three listed factors. *See* 29 C.F.R. § 1630.2(j)(1)(i) and (ii). Plaintiffs have made no allegations that they are blind or unable to see.[5] Hence, we are concerned with Plaintiffs' vision as compared to the vision of the average person in the general population.

There is no dispute that Plaintiffs' vision impairment is permanent and results in the reliance on corrective measures, eye glasses or contact lenses, in order to carry

[5] Plaintiffs point out in their Amended Complaint that "corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification." However, this standard applies to corrected vision not uncorrected vision. Plaintiffs' corrected visual acuity is acknowledged to be "20/20 or better." Hence, any implication that they are "legally blind" is without merit.

out normal daily activities.[6] However, Plaintiffs argue that we must evaluate their vision impairment without respect to these mitigating measures. Plaintiffs rely on the EEOC's Interpretive Guidance for § 1630.2(j), which provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630, App. § 1630.2(j)(2) para. 8. Accordingly, Plaintiffs argue that they are disabled because their uncorrected vision substantially limits their major life activity of seeing.

United responds that the EEOC's Interpretive Guidance is in direct conflict with the statutory language requiring that the physical or mental impairment "substantially limit" a major life activity. United argues that to evaluate whether an individual has an impairment without regard to mitigating or corrective measures effectively reads out the statutory requirement that the impairment be "substantially" limiting. United reasons that the determination of whether Plaintiffs are "disabled" must be made taking into consideration any mitigating or corrective measures utilized by Plaintiffs.

Therefore, the crucial determination becomes whether the EEOC's Interpretive Guidance is correct that disability inquiries should be made without regard to

[6] On appeal, we do not consider the effects, if any, that eye surgery, such as radial keratotomy, may have on the permanency or long term impact of Plaintiffs' vision. However, we are mindful that as technology advances so must our consideration of these questions.

mitigating or corrective measures or is in conflict with the statutory mandate that the impairment "substantially limit" a major life activity. The courts that have considered this issue are split. While some courts have expressly or implicitly followed the EEOC's guidance,[7] others have expressly or implicitly rejected the EEOC's guidance as being in direct conflict with the statutory language requiring a "substantial" limitation.[8]

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[7] *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir.1997) (stating "analysis of whether [plaintiff] is disabled does not include consideration of mitigating measures"); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir.1996) (holding EEOC's interpretation is consistent with the ADA's legislative history, thus, an individual's disability must be assessed without regard to mitigating measures); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir.1996) (stating determination made without regard to mitigating measures without discussion or application), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1349, 137 L.Ed.2d 506 (1997); *Fallacaro v. Richardson*, 965 F.Supp. 87, 93 (D.D.C.1997) ("This Court finds that the EEOC's 'no mitigating measures' interpretation is eminently reasonable, consistent with the language and purpose of the Rehabilitation Act, and supported by the legislative history of the ADA."); *Wilson v. Pennsylvania State Police Dep't*, 964 F.Supp. 898, 902-907 (E.D.Pa.1997) (expressly adopting EEOC guidance); *Sarsycki v. United Parcel Serv.*, 862 F.Supp. 336, 340 (W.D.Okla.1994) (relying on EEOC interpretation as authoritative without discussion).

[8] *See Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir.1997) (holding EEOC's interpretive guidance in conflict with statutory language and disability determinations should be made taking into consideration any mitigating measures) (2-1 decision); *Cline v. Fort Howard Corp.*, 963 F.Supp. 1075, 1081 n. 6 (E.D.Okla.1997) (recognizing split of authority and determining that "the better reasoned approach in the context of vision is one which evaluates the limitation with regard to the use and

We join those courts which have rejected this portion of § 1630.2(j) of the EEOC's Interpretive Guidance. We

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effectiveness of corrective devises"); *Gaddy v. Four B Corp.*, 953 F.Supp. 331, 337 (D.Kan.1997) ("EEOC Interpretive Guideline § 1630.2(j)'s pre-medicated perspective is in direct conflict with the ADA's express statutory language. . . . "); *Moore v. City of Overland Park*, 950 F.Supp. 1081, 1088 (D.Kan.1996) (same); *Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 881 (D.Kan.1996) (rejecting "without" portion of § 1630.2(j) because "plain language of the ADA conflicts with the EEOC's Interpretive Guidance"); *Schluter v. Industrial Coils, Inc.*, 928 F.Supp. 1437, 1445 (W.D.Wis.1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); *Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 813 (N.D.Texas 1994) (concluding "EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation"); *See also Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-192 n. 3 (5th Cir.1996) (noting that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity"); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir.1993) ("[A] person is not handicapped if his vision can be corrected to 20/200."), *cert. denied*, 511 U.S. 1011, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994); *Sweet v. Electronic Data Sys., Inc.*, No. 95-Civ.-3987, 1996 WL 204471, at *5 (S.D.N.Y.1996) (visual impairment of 20/20 in one eye and correctable to 20/80 in other eye does not qualify as a "disability" because it does not substantially limit ability to participate in any major life activity); *Deckert v. City of Ulysses*, No. 93-1295, 1995 WL 580074 (D.Kan. Sept. 6, 1995) (rejecting EEOC interpretation), *aff'd on other grounds*, 105 F.3d 669 (Table) (10th Cir.1996).

hold that this portion of the EEOC's Interpretive Guidance is in direct conflict with the plain language of the ADA. The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual. In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.

This portion of the EEOC's Interpretive Guidance is not only in direct conflict with the statute, but is also internally inconsistent with other portions. In discussing "substantially limit" generally, the Interpretive Guidance states:

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. . . .
>
> The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630, App. § 1630.2(j) para. 1-2 (emphasis added). Thus, the EEOC recognized it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA.

Furthermore, in discussing whether an individual is disabled under the "regarded as" prong of the ADA, 42 U.S.C. § 12102(2)(C), because the employer "regards" the individual as having a substantially limiting impairment when in fact the individual's impairment is not substantially limiting, the Interpretive Guidance uses the example of "an employee [who] has controlled high blood pressure that is not substantially limiting." *Id.* at § 1630.2(l) para. 6 (emphasis added). Under this example, the employee is not actually disabled because in the controlled state the impairment does not "substantially limit" a major life activity. The employee's controlled high blood pressure does not affect, in fact, the ability to perform a major life activity.

Accordingly, to state a prima facie case and survive United's motion to dismiss, Plaintiffs' vision in its corrected state must "substantially limit" their major life activity of seeing. Plaintiffs cannot make this showing. It is undisputed that Plaintiffs' corrected vision is "20/20 or better." Thus, while Plaintiffs' uncorrected vision would undoubtedly "substantially limit" their major life activity of seeing, this is a hypothetical situation. In fact, Plaintiffs do not limit their normal daily activities to those that could be performed with their uncorrected vision. Plaintiffs admit that with their corrective measures they "function identically to individuals without a similar impairment." Plaintiffs merely don their eye glasses (or

contact lenses) and go about all their normal daily activities in the same or similar condition, manner, or duration as the average person in the general population. Hence, Plaintiffs can prove no set of facts upon which relief may be granted on this claim.

Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major live activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing. *See Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 878 (D.Kan.1996) (defendant "is trying to have it both ways" by claiming he is disabled due to high blood pressure, but that it is controlled sufficiently that he can perform the job).

II. 42 U.S.C. § 12102(2)(C) – Regarded As Disabled

Subparagraph (C) defines a "disability," as "being regarded as having" a physical or mental impairment that substantially limits one or more of the major life activities of the individual. 42 U.S.C. § 12102(2)(C). The regulations provide three ways an individual is "regarded as" being disabled: (1) the individual: "[h]as a physical or mental impairment that does not substantially limit major life activities but is treated . . . as constituting such limitation;" (2) the individual "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;" or (3) the individual "[h]as none of the impairments defined in [29 C.F.R. § 1630.2(h)(1) and (2)]

but is treated . . . as having a substantially limiting impairment." 29 C.F.R. § 1630.2(l)(1)-(3). *See MacDonald*, 94 F.3d at 1444 (*quoting and adopting* 29 C.F.R. § 1630.2(l)). "Thus, '[a] person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment,' " regardless of whether the individual actually has an impairment. *MacDonald*, 94 F.3d at 1444 (*quoting Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir.1995) (citation omitted)). The focus is on the impairment's or the perceived impairment's effect upon the attitudes of others. *Id. See Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 913 (11th Cir.1996).

In this case, Plaintiffs contend United "regards" them as disabled in the major life activity of working.[9] Plaintiffs assert that United perceives them as unfit to work as global airline pilots because: (a) United's policy is not limited to certain pilot positions, aircraft, or routes but encompasses all pilot positions; (b) United presumed

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[9] In their Opening Brief, Plaintiffs assert that "United regards [them] as substantially impaired in the major life activity of seeing, working, or both." (Plaintiffs-Appellants' Opening Brief at 15). However, in their Amended Complaint, Plaintiffs' claim is limited to whether United regards them as substantially limited in the major life activity of working. (Plaintiffs-Appellants' Appendix at 9-10). In reviewing the grant of a motion to dismiss, we are concerned only as to whether Plaintiffs' complaint states a claim upon which relief may be granted. *Yoder*, 104 F.3d at 1224. Therefore, we consider only the claim found in Plaintiffs' Amended Complaint, i.e., whether United regards Plaintiffs as substantially limited in the major life activity of working.

without substantiation that they cannot perform the functions of the job; and (c) United disqualified them based on "myth, fear or stereotype" that individuals with uncorrected vision of worse than 20/100 constitute a safety hazard. In addition, Plaintiffs argue that other global airlines have similar or higher uncorrected vision standards than United, thus blocking Plaintiffs from seeking the same class of employment elsewhere in the industry.

United responds that it did not regard them as disabled. United argues that it did not regard Plaintiffs as substantially limited in the major life activity of working because its requirement did not preclude Plaintiffs from a "class of job." United contends that Plaintiffs merely "fail[ed] to meet the rational job-related safety requirements of the positions they s[ought]."

An employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that individual is incapable of performing a particular job. The statutory requirement that the employer regard the employee as having a substantially limiting impairment indicates that the employer regards an employee as substantially limited in the ability to work when the employer regards the employee's impairment or perceived impairment as foreclosing generally the type of employment involved. *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir.1997). *See Hileman v. City of Dallas, Tex.*, 115 F.3d 352, 354 (5th Cir.1997) ("An impairment must substantially limit employment in general, not merely the particular job that the plaintiff may wish to hold.").

In order "[t]o demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show 'significant[ ] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' " *Bolton*, 36 F.3d at 942 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i)). *See MacDonald*, 94 F.3d at 1444 (*quoting Bolton*). A "class of jobs" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). *See Siemon*, 117 F.3d at 1176 (*quoting* 29 C.F.R. § 1630.2(j)(3)(ii)(B)); *MacDonald*, 94 F.3d at 1444-45 (same). A "broad range of jobs in various classes" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(ii)(C). *See Siemon*, 117 F.3d at 1176 (*quoting* 29 C.F.R. § 1630.2(j)(3)(ii)(C)); *MacDonald*, 94 F.3d at 1445 (same). However, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). *See Siemon*, 117 F.3d at 1176 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i)); *MacDonald*, 94 F.3d at 1445 ("If neither of these definitions is met, and an individual instead shows only that he is unable 'to perform a single, particular job,' . . . the regulations and case

law make clear that he has not shown that he is 'substantial[ly] limit[ed] in the major life activity of working.' "); *Wooten*, 58 F.3d at 386 (holding that under the ADA, " 'working' does not mean working at a particular job of that person's choice"); *Bolton*, 36 F.3d at 942 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i)); *Welsh*, 977 F.2d at 1419 (holding that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act").

Therefore, in order to establish a disability under the "regarded as" prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes. In this case, we are concerned with whether Plaintiffs can present any set of facts based on their Amended Complaint establishing that United treated Plaintiffs as having a substantially limiting impairment. To do so, Plaintiffs must establish United's disqualification of them from all pilot positions as a significant restriction on their ability to perform a class of jobs.[10] *See Foreman*, 117 F.3d at 806 ("the question is whether Foreman was treated by [defendants] as having an impairment that substantially limits a major life activity"); *MacDonald*, 94 F.3d at 1445 (concluding that to establish a disability plaintiff must show defendant

[10] At oral argument, United stated that Plaintiffs were not disqualified from its non-passenger pilot positions. However, for the purposes of this appeal, we will assume Plaintiffs were disqualified from "all pilot positions" as they alleged in their Amended Complaint.

regarded him as being substantially limited in performing a class of jobs). We hold that Plaintiffs cannot make this showing. Taking all Plaintiffs' allegations as true, Plaintiffs can establish only that their physical impairment, their uncorrected vision, prevents them from working for United as a pilot; a single, particular job. They cannot show disqualification from a "class of jobs."

We are concerned with whether United regards Plaintiffs as "disabled," not whether the airline industry as a whole regards individuals with uncorrected vision of 20/100 or worse as "substantially limited" in a major life activity. It is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters. *See Cook*, 10 F.3d at 25-26 (using example demonstrating focus is on employer in question not other employers in the industry). However, we do examine the airline industry to assist in determining whether Plaintiffs' impairment substantially limits their employment generally in a "class of jobs."

The "class of jobs" Plaintiffs argue United disqualifies them from is that of "global airline pilot." However, this description is too narrow to constitute "class of jobs." A "class of jobs" consists of jobs that utilize "similar training, knowledge, skills or abilities." 29 C.F.R. § 1630, App. § 1630.2(j)(3)(ii)(B). As Plaintiffs' point out in their Amended Complaint, "[t]here is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines." (Plaintiffs-Appellants' Appendix at 10, ¶ 38(g)). Thus, the "class of jobs" to which Plaintiffs must compare themselves is that of all pilot positions at all airlines, because they all require the same or similar training, knowledge, skills, or

abilities. This class would include, but not be limited to, all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines. *See e.g. McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir.1997) (class of jobs at issue included all manufacturing jobs not only narrow range of assembly line manufacturing jobs requiring repetitive motion or frequent lifting of more than ten pounds); *MacDonald*, 94 F.3d at 1445 ("[T]axiing aircraft is neither 'a class of jobs,' nor 'a broad range of jobs in various classes,' but is instead 'a single, particular job.'"); *Wooten*, 58 F.3d at 386 (concluding plaintiffs' carpal tunnel syndrome "prevent[ed] him from performing a narrow range of meatpacking jobs"); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir.1995) (arm impairment did not prevent plaintiff from working in entire class of welding jobs, only those requiring substantial climbing); *Welsh*, 977 F.2d at 1419 ("an impairment that an employer perceives as limiting an individual's ability to perform only one job [firefighter] is not a handicap").

For example, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. § 1630, App. § 1630.2(j) para. 15. With this example, the EEOC illustrates an individual who is "not substantially limited in the ability to perform any other major life activity and, with regard to working, [is] only unable to perform either a particular specialized job or a narrow range of jobs." *Id. See Bolton*, 36 F.3d at 942 (*quoting* 29 C.F.R. § 1630.2(j)(3)(i) and *Welsh*); *Welsh*, 977 F.2d at 1419

(inability "to perform only one job is not a handicap under the [Rehabilitation] Act"); *Daley*, 892 F.2d at 215 ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."); *Forrisi*, 794 F.2d at 934 ("an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job"); *Tudyman*, 608 F.Supp. at 746 (concluding "refusal to hire someone for a single job does not in and of itself constitute perceiving the [person] as a handicapped individual").

Adopting Plaintiffs' reasoning would imply that anyone who failed to obtain a single job because of a single requirement of employment would become a "disabled" individual because the employer would thus be regarding the applicant's failure as substantially limiting in the major life activity of working. *Forrisi*, 794 F.2d at 935. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir.1996) (stating that "otherwise . . . anyone[ ] could establish a prima facie discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in [a protected] group"). This reading would stand the Act on its head. This provision of the ADA seeks to remedy perceived disabilities that, like actual disabilities, extend beyond the isolated mismatch of employer and employee. We agree with the court's sentiments expressed in Hileman, "[w]e refuse to construe the . . . Act as a handout to those who are in fact capable of working in substantially similar jobs. . . . " *Hileman*, 115 F.3d at 354 (discussing Rehabilitation Act).

Finally, we note that while the FAA may not believe there is a safety concern regarding pilots with uncorrected vision of 20/100 or worse, that alone does not prevent United from presenting evidence to the contrary, were it necessary to refute a prima facie case of discrimination. As long as United does not practice illegal discrimination, we discern no reason why United cannot maintain a higher standard for safety than the FAA. It must be remembered that the FAA sets the minimum criteria for a pilot's license, not the maximum.

Conclusion

We hold that Plaintiffs' Amended Complaint alleged sufficient facts to support a conclusion that their uncorrected vision constituted a physical impairment under the ADA. However, for the foregoing reasons, we hold that Plaintiffs cannot present any set of facts showing their vision, when viewed with mitigating and corrective measures, substantially limits the major life activity of seeing. Nor can Plaintiffs show United regarded them as substantially limited in a major life activity of working by finding Plaintiffs unfit for its commercial pilot positions. Therefore, we affirm the district court's dismissal of Plaintiffs' ADA claims for failure to state a claim upon which relief may be granted.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAREN SUTTON and KIMBERLY HINTON,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 96-1481
UNITED AIRLINES, INC.,	)	D.C. No. 96-S-121
Defendant-Appellee.	)	

JUDGMENT

Filed November 26, 1997

Before **BRORBY, BARRET** [sic], and **McKAY,** Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: /s/ Randy Simmons
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAREN SUTTON and KIMBERLY HINTON,
Plaintiffs-Appellants,
v.
UNITED AIRLINES, INC.,
Defendant-Appellee.

No. 96-1481

ORDER

Filed March 3, 1998

Before **BRORBY, BARRETT,** and **McKAY,** Circuit Judges.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active

service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Randy Simmons
Deputy Clerk

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(5)

Supreme Court, U.S.
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No. 97-1943

In The

Supreme Court of the United States

October Term, 1998

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONERS

VAN AARON HUGHES
Counsel of Record for Petitioners
TUCKER K. TRAUTMAN
KRISTIN L. WETENKAMP
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, Colorado 80202
Telephone: (303) 464-9409

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63pp

QUESTIONS PRESENTED

1. Does the Americans with Disabilities Act protect from discrimination an airline pilot with a severe but correctable vision impairment?

2. Should courts defer to the EEOC Interpretive Guidance that disabilities should be analyzed in their uncorrected state?

3. Is a commercial pilot regarded as disabled by a major airline that refuses to employ her in any pilot position due solely to her poor uncorrected vision?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. PILOTS ARE ACTUALLY DISABLED IN THE MAJOR LIFE ACTIVITY OF SEEING 9

A. Courts Should Determine Whether An Impairment Is Substantially Limiting Without Regard To Corrective Measures 10

1. The Court Should Defer To The EEOC's Interpretation Of The ADA As Protecting Substantially Impaired Persons Without Regard To Corrective Measures 12

a. The ADA Does Not Directly Address The Precise Question Of Corrective Measures 12

b. The EEOC Has Instructed Against Consideration of Corrective Measures 13

c. The Court Should Defer To The EEOC's Interpretation 15

2. Through Express Legislative History And Implicit Approval Of Prior Authority, Congress Manifested Its Intention That Disabilities Under The ADA Be Determined Without Regard To Corrective Measures .. 21

TABLE OF CONTENTS – Continued

Page

3. Evaluating Disabilities Without Regard To Corrective Measures Best Effectuates The Purpose Of The ADA 27

4. The Language Of The Statute Supports Determination Of Disabilities Without Regard To Corrective Measures 30

B. The Rule Against Consideration Of Corrective Measures Applies To Myopia 36

1. There Is No Principled Distinction Between Severe Myopia And Other Substantially Limiting, But Correctable, Impairments ... 36

2. There Is No Practical Reason To Distinguish Severe Myopia From Other Substantially Limiting, But Correctable, Impairments 38

II. UNITED REGARDED PILOTS AS DISABLED IN THE MAJOR LIFE ACTIVITY OF WORKING ... 40

A. By Disqualifying Pilots From Any Of Its Flying Positions Based Upon Their Physical Impairment, United Regarded Pilots As Disabled 41

B. Because It Deemed Them Unfit For Any Piloting Positions, United Regarded Pilots As Disabled With Respect To A Class Of Jobs 43

1. It Is Not A Defense To Pilots' Claim That Some Employers Do Not Discriminate As Does United 43

2. United Regarded Pilots As Unfit To Perform A Class Of Jobs 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 19

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 19

Alexander v. Choate, 469 U.S. 287 (1985) 24

Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997) 10

Arnold v. United Parcel Service, Inc., 136 F.3d 854 (1st Cir. 1998) 11, 29, 36, 37

AT&T Corp. v. Iowa Utilities Bd., 67 U.S.L.W. 4104 (1999) 17

Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905 (1997) .. 16, 20

Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264 (1996) 24

Baulos v. Roadway Express, Inc., 139 F.3d 1147 (7th Cir. 1998) 47

Berkovitz v. United States, 486 U.S. 531 (1988) 8

Bentivegna v. United States Dept. of Labor, 694 F.2d 619 (9th Cir. 1982) 25

Best v. Shell Oil Co., 107 F.3d 544 (7th Cir. 1997) 47

Blanchard v. Bergeron, 489 U.S. 87 (1989) 23

Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 116 S. Ct. 2342 (1996) 8

Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176 (1982) 13

TABLE OF AUTHORITIES – Continued

Page

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 18, 19

Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998) ..... *passim*

Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) 35

Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) 26

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 18

Coleman v. Southern Pac. Transp. Co., 997 F. Supp. 1197 (D. Ariz. 1998) 46

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 19, 24, 27, 31, 40

Cook v. State of R.I., Dept. of Mental Health, Retardation and Hosps., 10 F.3d 17 (1st Cir. 1993) 45

Davis v. United Air Lines., Inc., 662 F.2d 120 (2d Cir. 1981), *cert. denied*, 456 U.S. 965 (1982) 25

DePaoli v. Abbott Labs., 140 F.3d 668 (7th Cir. 1998) 44

Deane v. Pocono Medical Ctr., 142 F.3d 138 (3d Cir. 1998) 43, 45

Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998) 11

TABLE OF AUTHORITIES – Continued

Page

Dutcher v. Ingalls Shipbuilding, 53 F.3d 723 (5th Cir. 1995) 46

E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) 44, 45

EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) 19

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) 16, 21

Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996) 11

Fallacaro v. Richardson, 965 F. Supp. 87 (D.D.C. 1997) 11, 26, 28, 37

FDIC v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 21, 26

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 20

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) 47, 49

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) ... 19, 20

Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997) 11

Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) 34

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Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996) 11, 38

TABLE OF AUTHORITIES – Continued

Page

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Lane v. Pena, 518 U.S. 187 (1996) 10

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Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991) 20

Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933 (3d Cir. 1997) 11, 29, 38

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 35, 50

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 27

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 20, 21

TABLE OF AUTHORITIES – Continued

Page

N.L.R.B. v. Bell Aerospace Co. Div. Of Textron, 416 U.S. 267 (1974) 19

Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985) 25

North Haven Board of Educ. v. Bell, 456 U.S. 512 (1982) 35

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 16

Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), *cert. denied sub nom. Pollin v. Paralyzed Veterans of Am.*, 118 S. Ct. 1184 (1998) 19

Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) 16

Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) 35

Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952 (1998) 25 23

Reno v. Koray, 515 U.S. 50 (1995) 18

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 25

Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995) 11, 38

Runnebaum v. Nationsbank of Md., 123 F.3d 156 (4th Cir. 1997) 17

SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) 29

School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987) ..... *passim*

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TABLE OF AUTHORITIES – Continued

Page

Sharon v. Larson, 650 F. Supp. 1396 (E.D. Pa. 1986) 26

Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998) 46

Sicard v. City of Sioux City, 950 F. Supp. 1420 (N.D. Iowa 1996) 11, 34, 49

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 17

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 24, 28, 33, 41

Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983) 25

Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) 35

Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) 20

Traynor v. Turnage, 485 U.S. 535 (1988) 27, 30

Trembczsynski v. City of Calumet City, 1987 WL 16604 (N.D. Ill. August 31, 1987) 39

Udall v. Tallman, 380 U.S. 1 (1965) 20

United States Dept. of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986) 35

United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 29, 34

United States v. Board of Comm'rs of Sheffield, Ala., 435 U.S. 110 (1978) 49

United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113 (1849) 34

TABLE OF AUTHORITIES – Continued

Page

Washington v. HCA Health Servs. of Texas, Inc., 152 F.3d 464 (5th Cir. 1998) 10, 11, 12, 26, 36, 37

Webb v. Garelick Mfg. Co., 94 F.3d 484 (8th Cir. 1996) 44

Wilson v. Pennsylvania State Police Dept., 964 F. Supp. 898 (E.D. Pa. 1997) 11, 18, 28

STATUTES AND RULES

Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994) 6, 13, 18, 19, 21

5 U.S.C. § 553 (1994) 18

5 U.S.C. § 706(2)(A) (1994) 18

28 U.S.C. § 1254(1) (1994) 1

Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994) ..... *passim*

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) ..... *passim*

42 U.S.C. § 12101(a)(1) (1994) 39

42 U.S.C. § 12102 (1994) ..... *passim*

42 U.S.C. § 12111(8) (1994) 28

42 U.S.C. § 12112(a) (1994) 1, 9

42 U.S.C. § 12113(b) (1994) 7

42 U.S.C. § 12114(a) (1994) 35

42 U.S.C. § 12116 (1994) 13, 20

42 U.S.C. § 12186(b) (1994) 17

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12201(a) (1994) 24

42 U.S.C. § 12208 (1994) 35

42 U.S.C. § 12210(a) (1994) 35

42 U.S.C. § 12211 (1994) 35

Fed. R. Civ. P. 12(b)(6) 3

REGULATIONS AND AGENCY PUBLICATIONS

14 C.F.R. § 67.103 (1998) 48

14 C.F.R. § 67.203 (1998) 48

28 C.F.R. pt. 36, App. B, § 36.104 (1998) 14

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29 C.F.R. § 1630.2 (1998) ..... *passim*

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EEOC Order No. 915.002, 2 Compliance Manual 47

TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 130 F.3d 893, and is reproduced in the Joint Appendix ("J.A.") at page 45. The Order of the United States District Court for the District of Colorado is reproduced at J.A. 30.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1997. J.A. 75. Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 3, 1998. J.A. 76-77. Petitioners filed their Petition for Writ of Certiorari on June 1, 1998. This Court granted the petition on January 8, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES AND REGULATIONS INVOLVED

Section 3(2) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12102 (1994):

(2) Disability. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Section 102(a) of the ADA, 42 U.S.C. § 12112(a) (1994):

(a) General Rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 1630.2(j) of the ADA Regulations, 29 C.F.R. § 1630.2(j)(1), (2) (1998):

(j) Substantially limits –

(1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Excerpt, EEOC Interpretive Guidance for § 1630.2(j), 29 C.F.R. pt. 1630, App. § 1630.2(h) & (j), at 347-48 (1998):

(h) The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. *See* Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

(j) The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

STATEMENT OF THE CASE

As alleged in their Amended Complaint,[1] Petitioners Karen Sutton and Kimberly Hinton ("Pilots"), identical twin sisters, are both experienced commercial airline pilots. J.A. 17, ¶ 1. They have received the requisite licenses and medical certificates from the Federal Aviation Administration ("FAA") to fly any class of passenger airplane. J.A. 17-20, ¶¶ 1, 16.

Pilots' uncorrected vision is severely impaired. Pilots have uncorrected vision of 20/200 or worse in the right eye, and 20/400 or worse in the left eye. J.A. 23-24, ¶ 37(a), (b).[2] Without the use of corrective lenses, Pilots cannot conduct basic activities such as driving an automobile, watching television, or shopping in a public store. J.A. 24, ¶ 37(d). When wearing glasses or contact lenses, however, Pilots' corrected vision is 20/20. J.A. 23, ¶ 36.

Pilots have flown for regional commercial airlines, but it is their life-long goal to fly for a major global air carrier. J.A. 17-19, ¶¶ 1, 13. To that end, in 1992 both applied for pilot positions with Respondent United Air Lines, Inc. ("United").[3] J.A. 20-22, ¶¶ 19, 28. Pilots' credentials and experience far

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[1] Because the district court dismissed this case at the outset pursuant to Fed. R. Civ. P. 12(b)(6), the only facts contained in the record are the allegations of Petitioners' Amended Complaint, J.A. 17-29. In their statement of the case, Petitioners assume all of these allegations to be true.

[2] A person with 20/200 vision can see an object at 20 feet only as well as an unimpaired person could see the same object from 200 feet. J.A. 23-24, ¶ 37(b). The resolving power of an unimpaired person's eye is approximately one minute of arc, which permits recognition of letters occupying five minutes of arc. Thus, a person with 20/200 vision can only distinguish at 20 feet letters so large that they occupy five minutes of arc from 200 feet away. Frank W. Newell, *Ophthalmology Principles and Concepts* 149-50 (8th ed. 1996); Daniel G. Vaughan, et al., *General Ophthalmology* 382 (13th ed. 1992).

[3] Prior to passage of the ADA, United had twice previously rejected Ms. Hinton's applications because of her poor uncorrected vision. J.A. 20, ¶ 18.

exceed United's hiring standards. J.A. 19-20, ¶¶ 14-17.[4] They are qualified to fly for United, with the ability to perform all of the essential job functions. J.A. 23, 26, ¶¶ 35, 40.

Although Pilots' applications disclosed their poor uncorrected vision, J.A. 21-23, ¶¶ 24, 33, United invited Pilots to participate in flight simulator testing and interviews at its Denver Flight Training Center. J.A. 20-22, ¶¶ 19, 28. Pilots went to great efforts to prepare for the interview process, including training sessions and mock interviews with aviation consultants. J.A. 20-22, ¶¶ 21, 30.

When she arrived at United's Flight Training Center, United administered a flight simulator test to Ms. Hinton, on which she performed very well.[5] J.A. 21, ¶ 22. During the interview process, however, Pilots' interviewers informed them that United had made a "terrible, terrible mistake." J.A. 21, ¶ 23. United terminated Pilots' interviews, and rejected their applications, because they did not meet United's uncorrected vision standard for new applicants. J.A. 21-23, ¶¶ 23, 25, 32, 34.

United currently requires new applicants to have uncorrected vision of 20/100 or better. J.A. 25, ¶ 38(e). At one time, United required all of its new pilots to have 20/20 uncorrected vision. United later reduced its requirement to 20/70, then later to 20/100. *Id.* These adjustments were motivated not by any medical evidence, but rather by market forces United faced in competing for qualified candidates. *Id.*

United asserts that its requirement is a rational safety requirement, and believes that Petitioners' uncorrected vision limits their fitness to be hired as pilots. J.A. 24, ¶ 38(a). Yet it has no data or evidence to support this conclusion, or to rebut

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[4] For example, United requires 350 hours flight experience in fixed-wing aircraft as pilot or co-pilot. J.A. 19, ¶ 15. By 1992, Ms. Sutton and Ms. Hinton had compiled over 3,400 hours and 4,700 hours, respectively. J.A. 19-20, ¶ 16.

[5] Because Ms. Sutton's interview was randomly scheduled before the flight simulator test, she never had the opportunity to take the test. J.A. 22-23, ¶ 32.

the FAA's determination that there is no correlation between pilots' uncorrected vision and safety. J.A. 25, ¶¶ 38(b)-(d). Pilots have alleged that the requirement is not based upon any legitimate safety concerns. *Id.* Indeed, Pilots are informed and believe that United applies its vision requirement only to new applicants, not to existing pilots, and that many of United's current pilots have uncorrected vision as poor as or worse than Petitioners'.[6]

United applies its policy to all applicants for any of its thousands of piloting positions throughout the world, without regard to aircraft model, route, or flying conditions. J.A. 25-26, ¶ 38(f), (g). Moreover, there is nothing unique about United's pilot positions that distinguishes them from positions with other airlines. *Id.*

In December of 1992, Pilots timely filed claims of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"). J.A. 18, ¶¶ 3, 6. The EEOC issued a Determination of Probable Violations of the Americans with Disabilities Act in both cases, citing United for requesting disability-related information in a job application, discriminating against qualified individuals on the basis of a disability, and failing to maintain appropriate records. J.A. 26-27, ¶¶ 42, 43. United did not enter into meaningful conciliation efforts with the EEOC, and the Commission issued right-to-sue letters to both Pilots. J.A. 18, 27, ¶¶ 4, 7, 44.

Pilots brought suit against United under Section 3(2) of the Americans With Disabilities Act ("ADA" or "Act"), 42 U.S.C. § 12102(2) (1994). They alleged that United violated the Act by rejecting them because they are disabled, or because United regards them as disabled. Plaintiffs sought legal and equitable relief provided for in the Act, including injunctive relief ordering United not to apply unlawful criteria in future hiring decisions.

The district court granted United's motion to dismiss Pilots' action, holding that Pilots' vision is not a substantially

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[6] Pilots have not yet had the opportunity to conduct discovery to confirm this.

limiting impairment within the meaning of the ADA. The court of appeals affirmed. The court of appeals concluded that Pilots are impaired in the major life activity of seeing, but that they are not substantially limited in seeing when the effect of corrective lenses is taken into account. The court expressly acknowledged that its holding was directly contrary to interpretive guidelines of the EEOC and to decisions of the Eighth, Ninth, and Eleventh Circuits. J.A. 62 n.7. The court also held that Pilots had not stated a claim that United regarded them as disabled in the major life activity of working. The court found the relevant class of jobs to be all pilot positions at all airlines, J.A. 71-72, and concluded that United did not regard Pilots as disabled as to this class of jobs, given that Pilots were able to obtain work elsewhere in this class. J.A. 72-73.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision should be reversed for two independent reasons. Pilots are actually disabled within the meaning of the ADA, 42 U.S.C. §§ 12101-12213 (1994), and United regarded Pilots as disabled.

Every available method of statutory interpretation confirms the majority view among the courts of appeals that whether an individual is disabled should be determined without regard to available corrective measures. While the language of the ADA does not directly address this specific issue, it does support the majority view. The inability to perform a major life activity without the aid of corrective medications or devices is a substantial limitation.

The EEOC has so construed the statute in its Interpretive Guidance. Because the EEOC's construction was announced contemporaneously with the statute, at Congress' express instructions, in accordance with the Administrative Procedure Act, it is entitled to the highest level of deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the alternative, the Commission's view constitutes an interpretation of its own regulations and should be followed unless plainly erroneous.

The legislative history of the ADA speaks directly to the corrective measures issue, and demonstrates Congress' intention that corrective measures not be considered. Congress also implicitly approved this view by incorporating into the ADA language from the Rehabilitation Act that courts had consistently interpreted to permit a claim without regard to whether an impairment is correctable.

This approach also best effectuates the policies underlying Title I of the ADA, by protecting from discrimination employees with a substantially limiting impairment that does not prevent them from performing the work they seek. In contrast, the lower court's view would remove from the scope of the statute a broad class of persons Congress plainly intended to protect, and would embroil courts in dictating to disabled persons nationwide what steps they must take to attempt to correct their impairments.

The rule against consideration of corrective measures squarely applies to the circumstance of severe but correctable myopia. This condition is shared by only a small percentage of Americans. There is no principled or practical reason why the ADA should protect those who employ hearing aids, medication, prosthetic devices, and the like, but subject persons with severe but correctable myopia to continued discrimination.

Even if severe but correctable myopia is not a disability, United regarded Pilots as disabled in rejecting them from employment based upon a false perception of their abilities. Because United refused to consider Pilots for any of its flying positions, and because United's pilot positions are indistinguishable from those of other airlines, United treated Pilots as unfit to work within the entire relevant class of jobs.

ARGUMENT

There is no dispute that United excluded Pilots from employment on the basis of their poor uncorrected vision. United's defense of the merits of its policy raises an important issue, whether Pilots' employment would pose a direct threat to the safety of others. *See* 42 U.S.C. § 12113(b)

(1994); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2) (1998). Pilots allege that there is no safety justification, as evidenced by the FAA's conclusions[7] and by United's continued employment of existing pilots with vision equal to or worse than Petitioners'.[8] Pilots' allegation is assumed true for purposes of evaluating the sufficiency of their pleadings. *Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 2371-72 (1996) (Scalia, J., dissenting) (quoting *Berkovitz v. United States*, 486 U.S. 531, 540 (1988)). While both lower courts made reference to safety concerns, J.A. 42-43, 74, neither reached the direct threat question,[9] and the issue is not ripe for determination by this Court. *See Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 2210 (1998) (ADA "risk assessment must be based on medical or other objective evidence"); *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987) (evaluation of health and safety risks requires an individualized inquiry and appropriate findings of fact).

Thus, the only issue before this Court is the threshold inquiry of whether Pilots are disabled within the meaning of the ADA. United contends that the ADA does not protect Pilots from discrimination because their impairment is correctable and because other employers may not share United's perception that Pilots are unfit to fly commercial aircraft.

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[7] The FAA has determined that "[t]housands of airmen, exercising airline transport pilot, commercial pilot, private pilot, student pilot and air traffic control tower operator certificates have demonstrated their ability to safely perform their jobs while using corrective lenses for distant visual acuity that is poorer than 20/100 in each eye. . . . The FAA has found through experience that safety is not adversely affected by permitting medical certification at any level of uncorrected acuity." 59 Fed. Reg. 53226, 53231-32 (1994).

[8] Pilots believe the policy furthers no purpose other than to screen United's large number of new applicants and possibly reduce its health insurance costs.

[9] The court of appeals even acknowledged that Pilots' allegations sufficiently establish that they are "qualified" for the position of commercial airline pilot. J.A. 51.

Both arguments are mistaken. Pilots are actually disabled within the meaning of the ADA, and even if they were not, United regarded them as disabled. United may not discriminate against Pilots on the basis of an actual or perceived disability that does not prevent them from performing the job.

I. PILOTS ARE ACTUALLY DISABLED IN THE MAJOR LIFE ACTIVITY OF SEEING.

Title I of the ADA prohibits United from discriminating against a qualified person with a disability because of that disability. 42 U.S.C. § 12112(a) (1994). In this context, an actual disability is "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 U.S.C. § 12102(2) (1994).[10] The court of appeals below held that Pilots' poor uncorrected vision is an impairment of the major life activity of seeing. J.A. 57-58. The court also determined that Pilots' "uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing." J.A. 65. It then applied the "substantially limited" requirement incorrectly, however, holding that Pilots are not substantially limited in seeing because their vision impairment may be mitigated with corrective lenses. J.A. 65-66. Contrary to the view of the court below, whether an impairment is substantially limiting should be determined without regard to corrective measures. There is no valid reason to exempt vision impairments from this general rule. The ADA protects from discrimination persons with vision impairments sufficiently severe to constitute a substantial limitation in the uncorrected state,[11] without regard to the effect of corrective lenses.

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[10] The term "substantially limits" is not defined in the Act. *See* Comment, *The Americans with Disabilities Act: Great Progress, Great Potential*, 109 Harv. L. Rev. 1602, 1615 (1996) (noting Act's repeated use of ambiguous, undefined terms).

[11] Pilots do not argue that the use of corrective lenses in itself demonstrates a substantially limiting impairment. Use of corrective lenses does not prove or disprove that their wearer is disabled.

A. Courts Should Determine Whether An Impairment Is Substantially Limiting Without Regard To Corrective Measures.

This case affords the Court the opportunity to expressly approve the majority rule that impaired persons do not forfeit the protections of the ADA by using medication or other ameliorative devices to correct their impairments. The Court has approached, but not yet squarely decided, this issue. In a recent decision under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994),[12] this Court implicitly assumed that a disability can be substantially limiting even though corrected by ongoing treatment. *Lane v. Pena*, 518 U.S. 187 (1996) (assuming insulin-dependent diabetes to be a handicap, but deciding against plaintiff on grounds of sovereign immunity); *see also id.* at 200-01 ("The relevant facts are undisputed. The Department of Transportation violated § 504 by separating petitioner Lane from the Merchant Marine academy because he has diabetes.") (Stevens, J., dissenting).[13] In its leading decision to date interpreting the ADA, the Court expressly reserved judgment on whether the substantiality of an impairment should be assessed without regard to mitigating measures. *Bragdon*, 118 S. Ct. at 2206.

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[12] Because Congress adopted the ADA's definition of a "disability" verbatim from the definition of "handicap" under the Rehabilitation Act, courts have frequently considered case law under the latter act relevant to interpreting the ADA. *E.g.*, *Andrews v. State of Ohio*, 104 F.3d 803, 807 (6th Cir. 1997); *but see Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470 n.9 (5th Cir. 1998) (holding that restrictive judicial interpretations of the Rehabilitation Act are not controlling under ADA).

[13] Although not clear from this Court's opinion, it is readily apparent from the district court's recital of the facts that, in the corrected state, the plaintiff's condition was not substantially limiting. *Lane v. Pena*, 867 F. Supp. 1050, 1055 (D.D.C. 1994) (quoting doctor's conclusion that plaintiff's diabetes was under "extremely good control" and observing that the condition did not prevent plaintiff from achieving good grades at the Merchant Marine Academy, as well as rowing crew and participating in other sea-going activities).

A clear majority of the lower courts, including the First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits, have held that courts must determine the existence of a disability without regard to corrective measures. *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 857-63 (1st Cir. 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 519-23 (11th Cir. 1996).[14] Outside of the case at bar, only the Sixth Circuit has apparently held to the contrary. *Gilday v. Mecosta County*, 124 F.3d 760, 766-68 (6th Cir. 1997) (Kennedy, J., dissenting in part, and Guy, J., dissenting in part). The Fifth Circuit has announced an intermediate position, that courts should not consider a corrective measure unless it is a "permanent correction," such as a transplanted organ or artificial joint. *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998).[15]

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[14] Both the *Roth* and *Doane* opinions were written specifically in the context of vision impairments, crossed eyes and monocular vision, respectively. None of these leading cases involved the precise issue of severe but correctable myopia. At least two district courts have held that correctable myopia less severe than Pilots' can be a disability under the ADA. *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898 (E.D. Pa. 1997) (rejecting argument that 20/150 uncorrected vision could not be a disability); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996) (finding a genuine issue of material fact whether plaintiff with 20/200 uncorrected vision in both eyes corrected to 20/20 was disabled); *see also Fallacaro v. Richardson*, 965 F. Supp. 87 (D.D.C. 1997) (holding uncorrected vision of 20/600 correctable to 20/20 to be a handicap under the Rehabilitation Act); *but see Joyce v. Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996) (holding that uncorrected vision of 20/200 was not a disability).

[15] The Fifth Circuit had previously suggested, but did not hold, that it would depart from the majority rule. *Ellison v. Software Spectrum, Inc.*, 85

The Tenth Circuit erred in declining to follow the majority rule. It added a requirement to the ADA – that a disability must not be correctable – that does not appear in the language of the statute, is at odds with the EEOC guidance to which courts owe deference, is contrary to the legislative history, reverses the traditional interpretation of the same language in the Rehabilitation Act, negates the purpose of the ADA, and embroils courts in dictating what medications or other means must be employed to correct impairments.

1. The Court Should Defer To The EEOC's Interpretation Of The ADA As Protecting Substantially Impaired Persons Without Regard To Corrective Measures.

While the ADA does not directly address this precise issue, the responsible administrative agency has concluded that the protections of the Act do not turn on the availability of corrective measures. That conclusion is entitled to this Court's deference.

a. The ADA Does Not Directly Address The Precise Question Of Corrective Measures.

If "Congress has not directly spoken to the precise question at issue," the Court should follow a permissible administrative construction of the statute, rather than independently imposing its own interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Here, there is a significant body of agency guidance, legislative history, and case law under both the Rehabilitation Act and the ADA directly on the issue of corrective measures. Crucially, however, the text of the Act does not directly address the precise issue of whether courts should take into account available medication or other corrective measures in determining whether one is disabled.

F.3d 187, 191-92 n.3 (5th Cir. 1996). The court expressly disapproved this *dictum* in *Washington*, 152 F.3d at 469 n.5.

The court below purported to base its decision on the plain language of the ADA; but the Act is silent on the issue of corrective measures. "The language of the statute contains no requirement like the one imposed by the lower cour[t]," that employees must prove that their disabilities cannot be corrected. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 189 (1982). Indeed, the more faithful reading of the statutory language supports the majority view against consideration of corrective measures. *See* discussion, *infra*, at 30-35. Because the language does not touch on the precise issue before this Court, however, the Court should look first to the responsible agency's construction of the statute.

b. The EEOC Has Instructed Against Consideration of Corrective Measures.

The Equal Employment Opportunity Commission, which is responsible for administering Title I of the ADA, has squarely determined that whether an individual is substantially limited by an impairment is determined without regard to mitigating measures. Contrary to the Tenth Circuit's suggestions, the EEOC has remained consistent in this interpretation of the ADA.

In the ADA, Congress expressly directed the EEOC to issue regulations pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994) ("APA"), to carry out Title I of the ADA. 42 U.S.C. § 12116 (1994). Exactly one year after the passage of the ADA, the EEOC issued final rules for enforcement of the ADA. Included with those rules was an appendix entitled "Interpretive Guidance." 56 Fed. Reg. 35726, 35739 (1991). The EEOC followed the same notice and comment procedures in promulgating both the text of the final regulations and the Interpretive Guidance. Indeed, the Commission's notice generated over forty comments, totaling in excess of 400 pages, specifically on the issue of corrective measures. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 155 n.302 (forthcoming February, 1999).

In its regulations, the EEOC defines the term "substantially limited" to encompass not only one who is unable to perform a major life activity, but also one who is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (1998). The Commission clarified its definition of "substantially limited" at length in the attached Interpretive Guidance.

In particular, the EEOC directly ruled that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medication, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998). The Commission made the same instruction with respect to the existence of an impairment. 29 C.F.R. pt. 1630, App. § 1630.2(h), at 347 (1998). It is significant that the Commission's conclusion echoes the views of the Department of Justice under Title II of the ADA, 28 C.F.R. pt. 36, App. B, § 36.104, at 583 (1998). *See Bragdon v. Abbott*, 118 S. Ct. at 2209 ("We also draw guidance from the views of the agencies authorized to administer other sections of the ADA.") (citations omitted).

The EEOC explained that the ability to perform a major life activity only with the aid of a mitigating device or medication is itself a substantial limitation:

> [A]n individual who uses artificial legs would . . . be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998). The Commission could hardly have been clearer in its interpretation of its own regulations, and the underlying language of the

statute, as requiring disabilities to be analyzed without regard to corrective measures.[16]

c. The Court Should Defer To The EEOC's Interpretation.

The court below correctly observed that this Court's decision in *Chevron*, *supra*, requires it to defer to the EEOC's interpretation of Title I of the ADA unless "arbitrary, capricious, or manifestly contrary to the statute." J.A. 55 n.3 (quoting *Chevron*, 467 U.S. at 844). The lower court did not, however, afford the same deference to the EEOC's Interpretive Guidance, stating only that it was "entitled to some consideration" but not to "any special deference." *Id.* The court's reasoning is flawed in three respects. First, because the Interpretive Guidance was issued in accordance with the Administrative Procedure Act, contemporaneously with the

[16] The assertion of the court below that the EEOC contradicted this view in two other passages of its guidance, J.A. 64-65, is incorrect. As to the first, the Commission's position on corrective measures is not in any way at odds with its policy of examining the effect of an impairment upon each individual rather than attempting a "laundry list" of disabilities. 29 C.F.R. pt. 1630, App. § 1630.2(j), at 347 (1998). As to the second, there is no inconsistency between the mitigating measures language under the "actually disabled" prong of the ADA, and the Commission's use of a person with "controlled high blood pressure that is not substantially limiting" as an example of an individual "regarded as" disabled. *See* 29 C.F.R. pt. 1630, App. § 1630.2(l), at 350 (1998). Assuming the Commission intended "controlled" to mean "controlled by medication," the phrase suggests that controlled high blood pressure may or may not be substantially limiting, depending upon the severity of the underlying condition (without medication). For its example, the Commission simply postulated a case too mild to be substantially limiting. In contrast, under the Tenth Circuit's view, "controlled" high blood pressure would never be substantially limiting, and the Commission's words "that is not substantially limiting" would be superfluous. If the Commission had intended to employ the Tenth Circuit's approach, it would have so stated and given an appropriate example in its discussion of the "actually disabled" prong.

statute, and pursuant to Congress' express instructions, it is entitled to full *Chevron* deference. Second, the Interpretive Guidance is an interpretation of the EEOC's own rules and therefore should be respected unless clearly erroneous. Third, at a minimum the agency's interpretation is entitled to considerable weight, not merely to "some consideration." Under any of these three levels of deference, the Court should adhere to the policy stated in the EEOC Interpretive Guidance as a reasonable interpretation of the controlling statute and regulations.

This Court has instructed that deference to an agency's construction of the statute it administers is appropriate unless Congress has directly addressed the precise question at issue. *Chevron*, 467 U.S. at 842-43. A court should not impose its own interpretation of the statute, but rather "must sustain the [agency's] approach so long as it is 'based on a permissible construction of the statute.' " *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 909 (1997) (quoting *Chevron*, 467 U.S. at 843). Where, as in this case, Congress has expressly delegated authority to an agency to elucidate a provision of the statute, the agency's construction is controlling unless "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, at 843-44. Alternatively, if Congress has implicitly left an issue to the agency's interpretation, the Court should follow the agency's construction so long as it is a "reasonable interpretation" of the statutory language. *Id.* at 844. This is so even if the Court believes another reading would reflect a more natural or common usage of the statutory language. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979)); *Chevron*, 467 U.S. at 843 n.11.

The *Chevron* rule calls on courts to defer not merely to an administrative agency, but ultimately to Congress, where Congress has seen fit to delegate policy-making authority to a particular agency to fill interpretive gaps in the statutory structure. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Defining the limits of protections afforded by a remedial statute such as the ADA "is often more a question of policy than of law." *Id.* Under the *Chevron* rule, Congress is

well aware that the agency it selects, with its known policy biases, will resolve any ambiguities Congress leaves in statutory language. *AT&T Corp. v. Iowa Utils. Bd.*, 67 U.S.L.W. 4104, 1999 WL 24568, at *14 (January 25, 1999); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517. Congress delegated that policy-making function under Title I of the ADA to the EEOC, presumably because it deemed that agency best situated to make such judgments. *Cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (instructing that courts should look to an agency's "body of experience and informed judgment").

In *Bragdon v. Abbott*, *supra*, in holding that asymptomatic HIV infection could be a disability under the Act,[17] this Court applied *Chevron* specifically to agency interpretation of the ADA. 118 S. Ct. at 2209. The Court afforded deference to the interpretation of the Justice Department, which administers Title III of the ADA just as the EEOC administers Title I.[18] *See* 42 U.S.C. § 12186(b) (1994). The deference the Court afforded in *Bragdon* is equally appropriate here. *Bragdon*, like this case, turned largely upon the proper interpretation of the term "substantially limits" in the statutory language. While the Court's construction of the language was consistent with the agency's interpretation, the Court did not deem the phrase "substantially limits" to be unambiguous, such that

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[17] Prior to the *Bragdon* opinion, some courts and commentators had argued that HIV cannot be substantially limiting to persons who have not yet begun to experience its most dramatic symptoms. *See, e.g., Runnebaum v. Nationsbank of Md.*, 123 F.2d 156, 170-72 (4th Cir. 1997). The lower court's construction of the phrase "substantially limited" in the present context is strikingly similar to this view, which the Court declined to follow in *Bragdon*.

[18] The Court also gave deference to agency interpretation of the Rehabilitation Act, but did not decide whether full *Chevron* deference was appropriate in light of the fact that Congress had not delegated interpretive authority to a single agency. 118 S. Ct. at 2207. That concern does not apply to Title I of the ADA, which Congress expressly charged the EEOC with administering.

Chevron deference would not apply. In addition, the Court deferred to both the Justice Department's regulations and its technical assistance manual, without making any distinction between the two sources. Because the instant case also presents a question not directly addressed in the text of the ADA, but answered in the relevant agency's regulations and guidelines, the Court should again adhere to *Chevron* and defer to the agency's reasonable interpretation of the Act.

The court below asserted that because the EEOC placed the corrective measures rule in its Interpretive Guidance rather than the text of the regulations, the rule cannot receive *Chevron* deference. This elevates form over substance, abrogating the underlying purposes of the *Chevron* rule. The court below cited *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), for its distinction between regulations and mere interpretive rules. J.A. 55-56 n.3. But the distinction at the heart of the *Chrysler* opinion does not apply here. This Court explained in *Chrysler* that under the terms of the Administrative Procedure Act, an agency must afford interested parties notice of proposed rulemaking and an opportunity to comment in order for the rules it promulgates to acquire the force of law. 5 U.S.C. §§ 553 (1994) (imposing notice requirements), 706(2)(A) (1994) (granting deference to compliant rules). Interpretive rules and other statements of agency policy, procedure, or practice are not subject to these requirements, and thus do not carry the binding effect of law. *Chrysler*, 441 U.S. at 313-15; *Reno v. Koray*, 515 U.S. 50, 61 (1995). The Court did not afford full deference to the regulations at issue in *Chrysler* because they were not issued in compliance with the notice and comment requirements of the APA, but instead "were essentially treated as interpretative rules." 441 U.S. at 315-16.

The situation here is exactly the reverse. The EEOC's guidelines at issue were labeled as interpretive rules, but "were essentially treated as" regulations. The Commission promulgated both its regulations and Interpretive Guidance strictly in compliance with the APA, *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898, 902-03 n.4 (E.D. Pa. 1997); both are due the same level of deference. *See Bowles v.*

Seminole Rock & Sand Co., 325 U.S. 410, 417 (1945) (deferring to administrative interpretation contained in regulations and concurrently issued bulletin). Under *Chrysler*, deference turns not on what label the agency applies, but rather on compliance with the APA's rulemaking requirements. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997) (whether an agency interpretation carries the force of law under the APA depends upon the substance of the interpretation, not on whether the agency calls it an interpretive rule), *cert. denied sub nom. Pollin v. Paralyzed Veterans of Am.*, 118 S. Ct. 1184 (1998).

In addition, the Commission issued its Interpretive Guidance alongside the regulations it enacted pursuant to express congressional instructions. This Court traditionally "has deferred to contemporaneous regulations issued by the agency responsible for implementing a congressional enactment." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984) (following agency regulations under the Rehabilitation Act) (citing *N.L.R.B. v. Bell Aerospace Co. Div. Of Textron, Inc.*, 416 U.S. 267, 274-75 (1974)).[19] The Interpretive Guidance under the ADA is thus not comparable to the EEOC's guidelines under Title VII of the Civil Rights Act of 1964. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court did not afford deference to those guidelines because "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title."[20] 429 U.S. at 141 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (*Chevron* deference

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[19] The Court in *Darrone* also observed that, as in this case, the agency's interpretation was followed "from the outset," as reflected in the original notice of proposed rulemaking. 465 U.S. at 634 & n.14; *see also EEOC v. Associated Dry Goods*, 449 U.S. 590, 600 n.17 (1981).

[20] In declining to follow the Title VII guideline at issue, the Court found it significant that the guideline was not issued contemporaneously with the statute, and was contrary to the EEOC's earlier position, another administrative agency's view, and the relevant legislative history. 429 U.S. at 142-45. None of those factors is present here.

requires a congressional delegation of administrative authority). This Court's observation in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that the EEOC's Title VII guidelines are persuasive but not controlling, *id.* at 65 (quoting *General Electric*, 429 U.S. at 141-42), is not applicable to the ADA, which Congress expressly directed the EEOC to administer. 42 U.S.C. § 12116 (1994).

Even if *Chevron* did not apply, the lower court's conclusion that the agency's guidance should not receive any special deference would still be incorrect. If the Interpretive Guidance may not be deemed part of the EEOC regulations, at a minimum it constitutes the EEOC's interpretation of its own regulations.[21] Rendering authoritative interpretations of an agency's own regulations is a "necessary adjunct" of an agency's power to promulgate and enforce those regulations. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151-52 (1991) (explaining that applying its own regulations calls upon "the agency's unique expertise and policymaking prerogatives") (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980)). The Court therefore adheres to an agency's interpretation of its own regulations, so long as it is "neither 'plainly erroneous [n]or inconsistent with the regulation.' " *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 513 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)). This "substantial deference," *id.* at 512, is afforded even to informal pronouncements interpreting the agency's regulations. *See, e.g., Auer*, 117 S. Ct. at 911 (applying plainly erroneous standard to position taken in Secretary of Labor's amicus brief). This Court should respect the EEOC's clarification of its own definition of "substantially limits," a term undefined in the statutory text.

Finally, even in the absence of an express congressional delegation of policy-making authority, the EEOC's view

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[21] As pertinent here, the Interpretive Guidance's corrective measures rule expounds on 29 C.F.R. § 1630.2(h) (defining "impairment") and § 1630.2(j)(1) (defining "substantially limits").

would remain an important source of guidance. In *Meritor*, after withholding *Chevron* deference from the EEOC's guidelines under Title VII, the Court nevertheless followed the EEOC's interpretation, relying upon the agency's "body of experience and informed judgment." 477 U.S. at 65.[22] *Meritor* relied in turn upon *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), which afforded "great deference" to such an administrative interpretation. The Court has given "considerable weight" even to unwritten views of an agency. *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 429-30 (1986) (deferring to the FDIC's longstanding unwritten policy); *accord, Commercial Office Prods.*, 486 U.S. at 115.

The EEOC Interpretive Guidance for Title I represents a large body of explanatory material on a variety of complex topics under the ADA. To inform employers and employees that they may not safely look to this Guidance to understand the scope of the ADA would create significant uncertainties, burdening the courts or requiring Congress to codify the myriad issues it intentionally left to the relevant agencies' judgment. Thankfully, such a result is contrary to this Court's teachings.

2. Through Express Legislative History And Implicit Approval Of Prior Authority, Congress Manifested Its Intention That Disabilities Under The ADA Be Determined Without Regard To Corrective Measures.

Notwithstanding the relevant agency's interpretation, if "Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. In this instance, Congress did manifest its intention on the precise question at issue. Both through express legislative history and through its implicit approval of

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[22] This Court thus gave more deference to EEOC guidelines issued some sixteen years after passage of the statute, outside of the APA notice requirements, than the court below gave to the Interpretive Guidance now at issue.

case law under the Rehabilitation Act, Congress demonstrated its intent that disability determinations under the ADA proceed without regard to corrective measures.

The August 1989 report of the Senate Committee on Labor and Human Resources on the ADA specified that the existence of a disability should be determined without considering available mitigating measures. S. Rep. No. 101-116, at 23 (1989) ("Senate Report"). In the following session, the House of Representatives Committee on Education and Labor elaborated:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

H.R. Rep. No. 101-485(II), at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report"). The report of the House Judiciary Committee contains similar language, again using the example of a hearing impaired person, who is covered even if the hearing loss can be corrected with a hearing aid. H.R. Rep. No. 101-485(III), at 28-29, *reprinted in* 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").[23]

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[23] The only arguably inconsistent statement to be found in this legislative history is contained in the Senate Report's discussion of persons who are protected by the Act because they are regarded as disabled. The Senate Report includes among its examples persons with medical conditions, such as diabetes or epilepsy, "that are under control, and that therefore do not currently limit major life activities." Senate Report, at 24. Even assuming that the phrase "under control" refers to the use of medication, this language is unpersuasive on the issue of corrective measures. The House Labor Report and House Judiciary Report, both of which, unlike the Senate Report, were issued in the session during which the ADA was enacted, closely track and elaborate upon the language of the Senate Report. Significantly, however, both discarded this particular example. More importantly, this language is contained in a discussion focusing on the breadth of the "regarded as" prong. If the Senate Judiciary Committee intended to permit the existence of available corrective measures to defeat the "actually disabled" prong, it would have so stated in its discussion of that provision. Instead, in explaining the "actually disabled" language, the Senate Report, like both subsequent House reports, expressly instructed against consideration of corrective measures.

The pertinent language in all three reports could hardly be clearer. The hearing aid example in both House reports is especially telling. Just as a significant hearing impairment is a disability within the meaning of the Act even if it can be completely corrected with a hearing aid, Pilots' visual impairment remains substantially limiting even though it can be corrected.[24] As this Court has counseled, the fact that the ADA "can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

This legislative history persuasively demonstrates Congress' intention on the question of corrective measures. Pilots do not rely on an obscure citation in a single committee report, *compare Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring), but rather on a prominent aspect of the Act's effect as reported to both houses. The legislative history of the ADA is particularly compelling in

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[24] Corrective lenses and hearing aids were treated alike elsewhere in the Labor Report. House Labor Report, at 64, *reprinted in* 1990 U.S.C.C.A.N. 303, 346 (employers are not required to pay for "personal use items" such as hearing aids and eyeglasses).

light of the Act's breadth and wide bipartisan support.[25] *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring) (where a statute received bipartisan support and was carefully considered by the responsible committees, "the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress").

This Court has consistently respected relevant legislative history of the Rehabilitation Act, the ADA's closest cousin. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 295-96 (1985); *Darrone*, 465 U.S. at 631 n.10, 633-34; *Southeastern Community College v. Davis*, 442 U.S. 397, 405 n.6 (1979). Most notably, in *School Board of Nassau County, Florida v. Arline*, *supra*, this Court interpreted § 504 of the Rehabilitation Act to protect from discrimination a person suffering from contagious tuberculosis, concluding that "[n]othing in the legislative history of § 504 suggests that Congress intended" the defendants' suggested limitation. *Id.* at 282-83 & n.9. Here, the legislative history is even stronger, affirmatively demonstrating that Congress did *not* intend the lower court's restrictive construction of the ADA.

This conclusion is further supported by Congress' implicit approval of prior case law under the Rehabilitation Act, which consistently protected substantially impaired persons whose impairments were partially or wholly correctable. Congress provided that the ADA is to be applied at least as broadly as the Rehabilitation Act. 42 U.S.C. § 12201(a) (1994). The Court must therefore be wary of imposing limitations on the protections afforded by the Act that were not recognized prior to its enactment in 1990. In *Bragdon v. Abbott*, this Court heavily emphasized the administrative and judicial interpretation of the Rehabilitation Act prior to 1990, following the general rule that Congress is presumed to be aware of existing judicial

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[25] The conference reports on the ADA were approved in the House and Senate by votes of 377-28 and 91-6, respectively. *Congress Clears Sweeping Bill to Guard Rights of Disabled*, 48 Cong. Wkly. Rep. Q. 2227 (1990).

interpretations of statutory language it re-enacts. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993).

Prior to 1990, courts typically did not question that the Rehabilitation Act remained applicable to impairments that could be partially or completely corrected. In *Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983), the Third Circuit reinstated a Rehabilitation Act claim in favor of a bus driver who was suspended due to his poor uncorrected hearing, even though his hearing could be corrected with a hearing aid.[26] *Id.* at 228-29. In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), the Ninth Circuit held a plaintiff's condition of epilepsy to be a handicap, "[e]ven though medication controls her seizures." *Id.* at 573-74. Indeed, courts routinely permitted claims based upon medicated conditions such as diabetes or epilepsy without even considering the extent to which the conditions could be controlled with medication. *E.g., Bentivegna v. United States Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982) (diabetes); *Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2d Cir. 1981) (epilepsy), *cert. denied*, 456 U.S. 965 (1982). In the only reported case prior to the ADA's passage addressing the specific question of significantly impaired but correctable vision,[27] the

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[26] Congress made specific reference to the *Strathie* decision in considering the ADA. *See* Labor Report, *supra*, at 74 (citing *Strathie*), *reprinted in* 1990 U.S.C.C.A.N. 303, 357; *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong., 1st Sess. 328-29 (1989) (prepared statement of Arlene B. Mayerson) (discussing *Strathie* and *Jackson v. State*, 544 A.2d 291 (Me. 1988) (upholding Rehabilitation Act claim of insulin-controlled diabetic), *cert. denied*, 491 U.S. 904 (1989)).

[27] There is limited authority under the Rehabilitation Act addressing the circumstances of uncorrectable vision impairments or, at the other extreme, vision impairments sufficiently mild as not to require corrective lenses. *Compare Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985) (treating vision correctable only to 20/200 as a handicap), *with Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (holding that a condition

court treated as handicapped a myopic person whose vision of 20/120 in one eye and 20/300 in the other could be corrected to 20/20 with bioptic lenses. *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986).[28]

This Court's reasoning in *Bragdon*, 118 S. Ct. at 2208, is directly applicable. There is no instance prior to the enactment of the ADA in which a court or agency ruled that a substantial impairment is excluded from protection under the Rehabilitation Act if it is correctable.[29] The ADA should be construed in light of this line of authority, particularly where Congress gave its "active endorsement" to this prevailing rule in the relevant legislative history, *id.*, and "has expressed no dissatisfaction" with either the EEOC's Interpretive Guidance or the lower courts' majority rule. *Philadelphia Gear*, 476 U.S. at 437. Adhering to this well-established rule is "the most faithful way to effect the congressional design." *Bragdon*, 118 S. Ct. at 2208.

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of crossed eyes so mild that even untreated it had no effect on plaintiff's abilities was not a handicap). Neither extreme is instructive on the corrective measures issue, which is relevant only to the intermediate category of persons with vision impairments that are sufficiently severe to be substantially limiting but that are correctable.

[28] Bioptic lenses consist of conventional contact lenses with an additional telescopically enlarged central image. Because this creates a significant blind spot around the central image, the court concluded that the plaintiff was not otherwise qualified to obtain a driver's license. 650 F. Supp. at 1402.

[29] That argument has occasionally been advanced in Rehabilitation Act decisions subsequent to 1990. *See, e.g., Mackie v. Runyon*, 804 F. Supp. 1508, 1510-11 (M.D. Fla. 1992) (finding mental illness not substantially limiting where corrected by medication); *but see Fallacaro v. Richardson, supra* (severe but correctable myopia is a handicap under the Rehabilitation Act). The court in *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993), suggested that a person with impaired vision, even if uncorrectable, or an insulin-dependent diabetic would not be handicapped under the Rehabilitation Act. The Fifth Circuit has since expressly disavowed application of this suggestion to the ADA. *Washington*, 152 F.3d at 470 n.9.

3. Evaluating Disabilities Without Regard To Corrective Measures Best Effectuates The Purpose Of The ADA.

As part of "an ongoing congressional effort to eradicate discrimination in the workplace," *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995), Title I of the ADA is intended to permit disabled persons to overcome employers' unfounded preconceived notions of their capabilities. As demonstrated by the present case, including individuals with correctable disabilities properly effectuates that statutory purpose. In contrast, the lower court's approach would only undermine that purpose and needlessly require courts to dictate what treatments, medications, or other measures each disabled person must undergo.

Congress structured the ADA to define broadly who is disabled, but limited its remedies only to those who can demonstrate they are qualified to perform the work they seek. *Arline*, 480 U.S. at 285. This structure removes arbitrary and artificial barriers to employment, *see Griggs*, 401 U.S. at 431 (1971), and ensures employees "even-handed treatment," *Traynor v. Turnage*, 485 U.S. 535, 548 (1988), by requiring their abilities to be evaluated on the basis of medical evidence rather than mythology. *Arline*, at 285. That is exactly what Pilots seek in this case. Pilots merely request the opportunity to prove that they are qualified to perform the job for which they have been trained. They allege that they have been denied a lifelong employment goal on the basis of physical limitations unrelated to legitimate job qualifications. Their action illustrates that the majority rule against consideration of corrective measures directly advances the ADA's remedial purpose of promoting and expanding employment opportunities for those who can overcome significant physical impairments. *See Darrone*, 465 U.S. at 632-34 & n.13 (emphasizing remedial purpose of Rehabilitation Act, which "cannot be read in isolation from its history and purposes") (citations omitted).

In its opinion below, the Tenth Circuit disparaged Pilots' position – that they are disabled but nevertheless fully capable of performing the work at issue – as trying to "have it both ways." J.A. 66. The court stated that if Pilots' vision impairment meets the statutory definition of a disability, then as a matter of law Pilots are not qualified for a position with United. *Id.* These remarks reveal a profound misunderstanding of the structure and purpose of the Act.[30] Title I of the ADA protects *only* those individuals who, despite a significant physical impairment, can perform all of the essential functions of the job. *See Arline*, 480 U.S. at 287-89 & n.17 (plaintiff could state a claim only if she could prove she was qualified for the job of elementary schoolteacher and perform the job's essential functions); *cf. Southeastern Community College v. Davis*, 442 U.S. at 406 ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.").

This design is embodied in the language of the statute. For example, the statute expressly protects those who are capable of doing the job *with or without* any reasonable accommodation. 42 U.S.C. § 12111(8) (1994). Yet under the Tenth Circuit's view, one who is able to perform the job without even requiring a reasonable accommodation is surely

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[30] It is far more consistent with the purpose of the statute to conclude that *United* is trying to "have it both ways." It chose to disqualify Pilots on the basis of their uncorrected vision, eschewing the FAA's vision requirements, which are based solely on corrected vision. Now in court it reverses field and argues that only Pilots' corrected vision is reflective of their abilities and disabilities. *See Wilson*, 964 F. Supp. at 906 (observing "a certain irony inherent in defendants' argument" that a person who wears glasses is not substantially limited but is unfit to be a state trooper); *Fallacaro*, 965 F. Supp. at 93 ("The very fact that the IRS has a requirement for uncorrected as well as for corrected vision recognizes that the availability of corrective eyewear does not make a visual disability irrelevant."); Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 448 (1991) (expressing concern that those with correctable disabilities "may be placed in a Catch-22 situation").

not disabled at all, but simply trying to "have it both ways." Whatever the dubious merits of this viewpoint, it is directly at odds with the core purpose of the ADA. *Arnold*, 136 F.3d at 861. Unlike the majority of the lower courts, the Tenth Circuit has disregarded this Court's longstanding directive to "construe the details of an act in conformity with its dominating general purpose." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943); *see also United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). Instead, the court below has placed a sweeping new restriction upon the scope of the ADA that carries potentially disastrous consequences.

The Tenth Circuit's view that courts should take corrective measures into account can be carried out in one of two ways, either of which is antithetical to the goals of the Act. The first possibility would be for courts to consider only the corrective measures a given individual actually employs. Alternatively, courts could determine what measures are potentially available, whether or not the individual chooses to use them. Neither option is viable.

The emphasis of the court below on an impairment's "actual effect on the individual's life," J.A. 65, implies that the court would examine each plaintiff's condition in light of the corrective measures she is actually using. This approach would lead to absurd results. For example, Petitioners in this case would have become eligible for statutory protections had they thought to destroy their glasses before commencing the interview process. More importantly, the Tenth Circuit's rule would actively *discourage* those with impairments from taking all possible steps to improve their conditions. By "confus[ing] the disease with its treatment," *Matczak*, 136 F.3d at 937, this approach would transform the ADA into a mechanism for penalizing the disabled for finding ways to overcome their physical limitations. "It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities." *Arnold*, 136 F.3d at 863 n.7.

The alternative is to consider any potentially available corrective measure, whether or not a given individual has chosen to use it. This would empower employers, and ultimately courts, to dictate what corrective measures disabled persons must undertake to correct their disabilities. It would become a matter of judicial discretion, rather than personal choice in consultation with one's physician, whether an impaired person should accept medication with significant side effects, seek out experimental treatments, undergo invasive surgery, and so forth. This approach is contrary to this Court's admonishment that courts must be "cautious not to rewrite legislation" in "areas fraught with medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427 (1974); *see also Traynor v. Turnage*, 485 U.S. at 552 ("It is not our role to resolve this medical issue on which the authorities remain sharply divided."). Since the statute offers no standards to employ in making such judgments, the rule would almost certainly be applied in an arbitrary and inconsistent fashion, offering employers and employees alike no guidance as to when the provisions of the ADA apply. If Congress had intended to create such a peculiar statutory scheme – delegating to courts the role of dictating what steps impaired persons must take in order *not* to be protected by the statute – it surely would have so stated expressly.

Because the Tenth Circuit's construction defeats the purposes of the Act, this Court should follow it only if compelled by the plain language of the statute.

4. The Language Of The Statute Supports Determination Of Disabilities Without Regard To Corrective Measures.

Thankfully, the language of the ADA, although not directly addressing this precise issue, supports the majority view. Even if this Court were to disregard *Chevron* and interpret the statute anew, rather than simply confirming that the agency construction is a permissible reading of the ADA, it should still conclude that the existence of a disability must

be determined without regard to available corrective measures.

The majority rule reflects a superior construction of the statute for three reasons. First, the statute reaches any impairment that "substantially limits" a major life activity. The term "substantially limits" reasonably encompasses the inability to perform a major life activity except with the assistance of medication or a corrective device. Second, a contrary reading of this phrase is inconsistent with other key provisions of the ADA. Third, Congress' failure to expressly limit disabilities covered under the ADA to uncorrectable conditions strongly counsels against judicial creation of such a restriction.

The first flaw in the lower court's reasoning is its reading of the phrase "substantially limits" as restricting the Act's protections only to correctable impairments. This construction diverges sharply from this Court's unwillingness to read limitations into the operative language of the ADA not stated explicitly in the text. *See Bragdon*, 118 S. Ct. at 2205 (argument that "major life activities" under the ADA are limited to matters of a public, economic, or daily character "founders on the statutory language"); *Darrone*, at 465 U.S. at 632 (rejecting proposed limitation of § 504 to federal aid designed to promote employment where "§ 504 itself contains no such limitation"). The court below determined that Pilots' vision is substantially limited without corrective measures, but is not substantially limited with corrective measures. To then emphasize that Pilots can see with corrective lenses begs the question. It is impossible to apply the "substantially limits" test without *first* deciding whether to examine the corrected or uncorrected state.

The phrase "substantially limits" is more easily read to support the majority rule. As the Court instructed in *Bragdon*, the ADA "addresses substantial limitations on major life activities, not utter inabilities." 118 S. Ct. at 2206. In *Bragdon*, plaintiff's major life activity of reproducing was restricted by the serious health risks her condition created. Here, Pilots' major life activity of seeing is restricted in that they cannot perform it without the aid of corrective measures. The limitation in this case is thus even more direct. Pilots'

limitation does not merely affect the wisdom or desirability of performing the major life activity, but the physical ability to perform it at all. Whereas the *Bragdon* plaintiff was at least physically capable of reproducing, with or without the use of corrective measures,[31] Pilots essentially cannot see without corrective lenses.

The *Bragdon* analysis is consistent with the EEOC's definition of "substantially limited" as "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (1998). The Commission reasons that a person who "cannot perform major life activities without the aid of medication," is significantly restricted. 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998). This applies to Pilots. Pilots can see only with corrective lenses, just as many with hearing impairments can hear only with a hearing aid, and many diabetics can function only with insulin. This is a *restriction* upon Pilots' ability to perform a major life activity.[32] The restriction is *significant*, in that it is neither a hypothetical limitation nor limited to particular circumstances, but exists at all times.[33] "It is certainly no affront to common English usage," *Chevron*, at 860, to consider the inability to perform a major life activity without resort to

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[31] The corrective measure of antiretroviral therapy could lower, but not eliminate, the risks of choosing to reproduce. 118 S. Ct. at 2206. It is noteworthy that the Court included the costs of such therapy among the limitations caused by plaintiff's condition. *Id.*

[32] In contrast, a person would likely not be restricted who elects to employ a corrective measure but is able to perform the relevant life activity even without it. Examples would be a person who takes mild painkillers for arthritis but can function without them, or a person with a mild hearing impairment who uses a hearing aid even though he can hear adequately without it.

[33] A corrective measure that is necessary only on a sporadic basis, for example medication for a severe allergy to a particular pollen that is prevalent only for a short time each year, would arguably be a restriction but not a significant restriction.

corrective devices or medication to be a "significant restriction" or a "substantial limitation."

The lower court's construction of the ADA is flawed for a second reason: it is at odds with other key provisions of the ADA. For example, the lower court's reasoning applies equally to impairments mitigated by a reasonable accommodation. The ADA permits a person who is substantially limited in the major life activity of working to ask for a reasonable accommodation by the employer in order to overcome the limitation. Under the lower court's reasoning, however, if the individual is able to work with a reasonable accommodation, then the impairment no longer "affects the individual in fact."[34] J.A. 64. This illustrates the flaw in the lower court's analysis. The fact that an employee can perform a job only with a reasonable accommodation is itself a substantial limitation. By the same token, the ability to perform a major life activity only with medication or other corrective measures is also a substantial limitation.[35]

Similarly, the Tenth Circuit's reasoning cannot be reconciled with the second prong of the definition of disability, having a "record of" being disabled. The "record" prong illustrates that Congress intended to protect an impaired person even though the person "may at present have no actual incapacity at all." *Southeastern Community College v. Davis*, 442 U.S. at 405-06 n.6; *see also Arline*, at 279. This provision demonstrates the incongruous results that the Tenth Circuit's approach would require. Consider the EEOC's example of a

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[34] To borrow an example from the EEOC, an employee who is restricted from a class of jobs because he cannot carry heavy objects may ask his employer to provide a dolly as a reasonable accommodation. EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the ADA* III-9 to -10 (1992). But the Tenth Circuit's reasoning would compel the conclusion that, because the employee is able to work in the relevant class of jobs simply by using a dolly, he is not substantially limited at all.

[35] After all, a corrective measure is nothing more than a reasonable accommodation provided by an individual herself, rather than by her employer.

person with heart disease that has been cured. EEOC, *Technical Assistance Manual*, at II-8 (1992). The "record" prong of the ADA protects this person. Yet a person with heart disease that cannot be cured, but only controlled through medication or use of a pacemaker would, according to the court below, not be protected. It is inconceivable why the latter situation should be deemed less deserving of protection under the Act.

As this demonstrates, the decision below works unacceptable mischief to Congress' statutory design. The lower court failed to properly apply the term "substantially limits" in its context within the structure of the ADA as a whole. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. at 455 (1993) ("in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (terms in a statute must be read in the context of the "surrounding body of law into which the provision must be integrated") (Scalia, J., concurring). The first prong of the ADA's definition of disability at a minimum protects those persons who presently have an impairment that is substantially limiting even after applying available mitigating measures. The second prong of the ADA protects those who previously had, but no longer have, a substantially limiting impairment. There is nothing in this structure to suggest that Congress wished not to protect an intermediate category of persons who have experienced a substantially limiting impairment and have not been able to eliminate the impairment, but are able to correct the symptoms on an ongoing basis using medication or other means.

The third flaw in the lower court's construction of the statute is that it adds terms to the Act that Congress chose not to employ. Congress could have explicitly instructed courts to consider impairments after taking into account reasonably available corrective measures, or simply specified that the statute reaches "impairments after treatment" or "uncorrectable impairments." *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996). Congress could have required

plaintiffs to exhaust available medical remedies before bringing an action, just as it often requires plaintiffs to exhaust administrative remedies. Alternatively, it could have charged any of the enforcing agencies with conducting an analysis of which commonly experienced impairments can and cannot be corrected with current medical technology.

This Court has always been skeptical of attempts to add words into a statute that Congress could have inserted itself if it desired. *See, e.g., United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (refusing to add words "indirect recipients" to Rehabilitation Act); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (refusing to add words "aiding and abetting" to securities statute). Attempts to infer restrictions in broad remedial legislation are particularly suspect. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973). Certainly Congress knew how to limit the scope of the ADA where it wished. Indeed, it inserted express exceptions for many categories of individuals it determined it did not wish to protect. 42 U.S.C. §§ 12114(a) (current users of illegal drugs); 12210(a) (same); 12208 (transvestites); 12211(a) (homosexuality and bisexuality); 12211(b)(1) (sexual behavior disorders), 12211(b)(2) (compulsive gambling, kleptomania, or pyromania). It could as easily have excepted correctable impairments, but chose not to. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 23 (1981) (concluding that Congress manifested its intentions by placing restrictive conditions on some provisions of an act but not others); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (presuming that Congress' inclusion of some exemptions but not others was deliberate). Because Congress did not speak directly to the issue, to exclude a broad category of individuals from statutory protection in defiance of the implementing regulations under the ADA as well as the relevant legislative history would be arbitrary, unfair, and unfaithful to basic canons of statutory construction. *Arline*, at 286-87 n.15.

B. The Rule Against Consideration Of Corrective Measures Applies To Myopia.

The First Circuit in a footnote has questioned, but not decided, whether correctable myopia should be made an exception to the majority rule against consideration of corrective measures. *Arnold*, 136 F.3d at 866 n.10. This Court should not create such an exception. There is no principled distinction between severe myopia and other correctable impairments, nor is there any practical reason to exempt severe myopia from the general rule.

1. There Is No Principled Distinction Between Severe Myopia And Other Substantially Limiting, But Correctable, Impairments.

The view that myopia should receive different treatment than any other substantial, but correctable, impairment is devoid of any defensible theoretical underpinnings. The position is divorced from the language of the statute, the relevant legislative history, and the EEOC regulations and Interpretive Guidance, none of which treat vision impairments differently from other impairments. There is no justifiable limitation that might be imposed upon the scope of the ADA that would act to exclude myopia but not other correctable impairments.

The only lower court to follow the majority rule against consideration of corrective measures, but affirmatively advance a limited exception, is the Fifth Circuit. In *Washington*, *supra*, the Fifth Circuit proposed that the majority rule should not encompass "permanent corrections" such as an organ transplant. 152 F.3d at 471. Such an exception would have little effect in practice. A disability that has been "permanently corrected" need not qualify as an actual disability, since it will typically receive the ADA's protection based upon the individual's record of having a disability. In any event, the exception would provide no comfort to United, because Pilots' impairment has not been permanently corrected. While the Fifth Circuit declined to state a position regarding corrective lenses, *id.*, it did declare that diabetes, epilepsy, and hearing impairments would be considered in the

uncorrected state. *Id.* at 470. Pilots' corrective measure is similarly ongoing. They use corrective lenses every day just as a person with impaired hearing uses a hearing aid every day.

The *Arnold* footnote observed that corrective lenses can provide total control of the symptoms of myopia. 136 F.3d at 866 n.10. Allowing this to be a basis for evading the majority rule against consideration of corrective measures would deprive the rule of any meaning. After all, an impairment that remains substantially limiting even after applying available mitigating measures is necessarily a disability, regardless of whether the court takes the mitigating measures into account.[36] Thus, the corrective measures issue is relevant only in those cases where an impairment's limiting effects can in fact be corrected. To adopt the rule that courts should consider impairments in the uncorrected state, but confine it to impairments that cannot be corrected, would render the rule a tautology.

The related argument that corrective lenses need no protection because they are simple to employ would also largely defeat the rule against consideration of corrective measures. The act of putting in contact lenses is comparable to putting in a hearing aid, taking daily medication, strapping on a prosthetic limb, and so on. As demonstrated above, all of these corrective measures address impairments exactly of the nature that Congress intended the ADA to cover. There is no reason to sanction disability discrimination against certain disabled persons simply "because their prosthetic device happens to be exceptionally good." *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997). To the contrary, this only makes the discrimination more pernicious.[37]

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[36] This is why this Court did not need to decide the corrective measures issue in *Bragdon*. The Court deemed plaintiff's impairment to be substantially limiting even with available corrective measures. 118 S. Ct. at 2206.

[37] An analogy to the requirement that employers provide reasonable accommodations illustrates the point. Courts are less tolerant, not more

None of these purported justifications proceed from any principled distinction between myopia and other impairments. At best, they may reflect a concern that it might be poor public policy to include severe but correctable myopia within the ADA. Even if there were any validity to this concern, the decision to exempt one particular type of impairment from the Act for policy reasons must come from Congress. Courts should not draw distinctions under the statute "on the basis of judges' personal policy preferences." *Chevron*, 467 U.S. at 865.

2. There Is No Practical Reason To Distinguish Severe Myopia From Other Substantially Limiting, But Correctable, Impairments.

While this Court need not reach the issue, the assertion that there is a strong policy justification for exempting severe myopia from the general rule against consideration of corrective measures does not withstand serious scrutiny. The ADA should protect from discrimination the small minority of Americans with severe myopia comparable to Pilots, just as it protects other Americans with substantial, but correctable, impairments.

The argument against myopia seems to rest upon the concern that because there are many Americans who wear glasses or contact lenses, it would be imprudent to include this group within the ADA. This fear proceeds from a fallacy. The rule against consideration of corrective measures does *not* render a person disabled merely by virtue of the fact that she uses a corrective measure. The lower courts that have joined the majority rule have been careful to observe that the use of a corrective measure in itself is not a disability. *See Harris*, at 521; *Roth*, at 454; *Matczak*, at 937-38. Certainly Pilots have never argued that wearing glasses is a *per se* disability. To the contrary, it is United that seeks to impose a *per se* rule, that a person may never be considered disabled on the basis of correctable myopia.

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tolerant, of an employer's refusal to make an accommodation where the accommodation is relatively simple and inexpensive.

Many Americans experience myopia so minor that, even left uncorrected, the condition either would not be substantially limiting or would not qualify as an impairment at all. *See Trembczsynski v. City of Calumet City*, 1987 WL 16604 (N.D. Ill. August 31, 1987) (holding that vision worse than 20/20 but better than 20/40 is not an impairment). Pilots' action does not require the Court to attempt to determine exactly what level of vision impairment may constitute a substantial impairment, a question best left to case-by-case determination. It is sufficient that Pilots' allegations amply supports the Tenth Circuit's conclusion that, without corrective lenses, their vision is a substantially limiting impairment.

Pilots' vision is not better than 20/200 in one eye and 20/400 in the other. This places them in the small minority of Americans with severe impairment of visual acuity. *See* David J. Lee, et al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 Ophthalmology 552, 553-54 (1998) (categorizing uncorrected vision worse than 20/50 as a "mild" impairment, worse than 20/100 as a "moderate" impairment, and worse than 20/200 as a "severe" impairment). Data from the National Health Survey conducted through the Department of Health, Education, and Welfare has in the past revealed only 2.4% of the adult population as suffering from uncorrected vision worse than 20/200. Jean Roberts, *Binocular Visual Acuity of Adults, United States, 1960-1962* 3 (National Center for Health Statistics, Series 11, No. 3; Public Health Service publication no. 1000, 1968). The most recent available calculation estimates that 7,882,000 Americans between the ages of 25 and 74 have uncorrected visual acuity worse than 20/200. Lee, *supra*, at 556. Simply stated, the average American does not share Pilots' impairment.

The group of Americans sharing Pilots' severe visual impairment is well within the range that Congress contemplated in enacting the ADA. Congress deliberately chose not to limit the scope of the statute to "traditional handicaps." *Arline*, at 280 n.5. The opening sentence of the Act anticipated that its coverage would extend to some 43 million Americans. 42 U.S.C. § 12101(a)(1) (1994).

While there are certainly many Americans with severely impaired vision, this is hardly cause for alarm. In determining the effect protection under the ADA may have upon employers and the judiciary, it is not the raw number of persons with impaired vision that is relevant, but only the number of such persons who face discrimination because of their impairment. Few, if any, employers have cause to restrict applicants from employment for which they are qualified on the basis of uncorrected vision. Judging from the dearth of reported case law on the issue of correctable myopia, such discrimination is apparently very rare.

In any event, the Court should not withdraw the protections of the ADA from particular impairments based only on a head count. Eliminating those with severely impaired vision from coverage under the ADA based upon their sheer number would set a far-reaching precedent, since a comparable or greater number of Americans suffer from other significant impairments such as diabetes, hypertension, heart disease, hearing impairments, and arthritis. *Statistical Abstract of the United States* 149 (Bureau of the Census, 118th ed. 1998). Such a numeric approach is unfaithful to the goals underlying the ADA and the Rehabilitation Act, acts patterned on the Civil Rights Act, the protections of which are available to *all* Americans. *Arline*, at 277-78 n.2; *Darrone*, 465 U.S. at 626. Creating an exception for severe, but correctable, vision impairments would invite the lower courts to exclude from the protections of the ADA millions of Americans with other severe, but widely experienced, impairments. There is no theoretical or practical reason to so narrow the scope of the ADA in defiance of Congress' clear intentions.

II. UNITED REGARDED PILOTS AS DISABLED IN THE MAJOR LIFE ACTIVITY OF WORKING.

A separate and independent basis for reversing the lower court's decision is its failure to properly apply the third prong of the ADA's definition of a disability. Even in the absence of an "impairment that substantially limits one or more . . . major life activities," the Act protects individuals from "being

regarded as having such an impairment." 42 U.S.C. § 12102(2)(A), (C) (1994). Pilots' allegations establish a claim under this provision. The lower court's conclusion that Pilots did not adequately allege that United regarded them as disabled with respect to a class of jobs is incorrect.

A. By Disqualifying Pilots From Any Of Its Flying Positions Based Upon Their Physical Impairment, United Regarded Pilots As Disabled.

As this Court emphasized in *Arline*, the "regarded as" language of the ADA is a crucial component of Congress' effort to eliminate discrimination against individuals based upon unfounded, generalized perceptions of their abilities. Regardless of whether Pilots' vision impairment is deemed substantially limiting, United treated it as such by considering Pilots to be unfit to fly in United's fleet. Because this discrimination was based upon a physical characteristic unrelated to Pilots' actual abilities, it runs afoul of the ADA.

Persons who are regarded as having an impairment, even though they actually have no incapacity, are exactly the kind of individuals the Rehabilitation Act and the ADA are intended to protect. *Southeastern Community College v. Davis*, 442 U.S. at 405-06 n.6. The "regarded as" provision protects an individual whose impairment does not substantially diminish her capabilities, "but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Arline*, 480 U.S. at 283. This Court has emphasized that this provision is central to achieving the core purpose of the Rehabilitation Act and the ADA:

> [T]he basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a

> result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Arline, at 284 (footnote omitted).

Pilots have alleged precisely such discrimination on the basis of unfounded perceptions. Their allegations demonstrate that United regarded them as substantially limited in the major life activity of working.[38] United discriminated against Pilots based on a single physical limitation, poor uncorrected vision, deeming them unfit for any of its thousands of piloting positions around the world. Even if Pilots' uncorrected vision is not in itself substantially limiting, Pilots at a minimum have adequately alleged that it "is treated by a covered entity as constituting such limitation." 29 C.F.R § 1630.2(l)(1) (1998).

Pilots allege that United's policy is unsupported by any legitimate safety concerns, and is based only on myth, fear, and stereotype. J.A. 24-25, ¶ 38(b)-(e). This Court has instructed that permitting an employer to act without challenge upon a purported threat to health and safety would render employees "vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent." 480 U.S. at 285. Indeed, the "regarded as" prong was intended to lower attitudinal barriers based upon "concerns regarding . . . safety, insurance, liability." House Judiciary Report, at 30.[39] Thus, where an employer alleges discrimination as a result of unfounded safety concerns, a

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[38] Contrary to the Tenth Circuit's suggestion, J.A. 67 n.9, Pilots' allegations also encompass the fact that United regards them as substantially limited in seeing. J.A. 23-27. As they did in the court below, however, Pilots will focus upon the life activity of working, as it goes to the heart of United's unfounded perceptions.

[39] The House Judiciary Report was careful to point out, however, that a plaintiff is not required to prove that the discrimination was occasioned by such safety concerns. *Id.* ("It is not necessary for the covered entity to articulate one of these concerns.").

court may infer that the discrimination is based upon myth, fear, and stereotype. Discrimination on the basis of myth, fear, and stereotype, while not an express requirement of the statute, *Deane v. Pocono Medical Ctr.*, 142 F.3d 138, 144 (3d Cir. 1998), is in itself sufficient to demonstrate that United regarded Pilots as disabled. 29 C.F.R. pt. 1630, App. § 1630.2(l), at 350 (1998) ("[a]n individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability").

Few industries are as susceptible to "public fear and misapprehension," 480 U.S. at 284, as the airline business. Under this Court's holding in *Arline*, United cannot discriminate on the basis of such fears unless it can prove they have a factual basis.

B. Because It Deemed Them Unfit For Any Piloting Positions, United Regarded Pilots As Disabled With Respect To A Class Of Jobs.

Emphasizing that Pilots were able to find work with regional airlines, the court below determined that United does not regard Pilots as substantially limited in working, because United's perceptions do not eliminate Pilots from a class of jobs. The lower court reached this conclusion despite acknowledging that it is the perceptions of United, not other employers in the field, that are relevant. J.A. 71. The court's holding can only be supported by improperly assuming that Pilots' factual allegations are false.

1. It Is Not A Defense To Pilots' Claim That Some Employers Do Not Discriminate As Does United.

Assuming that Pilots must prove that United regarded them as disabled with respect to a class of jobs, it is not necessary for Pilots to demonstrate that all other employers so regard them as well. United is not relieved of responsibility under the ADA merely because some employers do not share its discriminatory attitudes.

The ADA's implementing regulations specify that a person is not substantially limited in the major life activity of working unless "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i) (1998). A "class of jobs" refers to those positions utilizing similar training, knowledge, skills or abilities within a given geographical area. 29 C.F.R. § 1630.2(j)(3)(ii) (1998); 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998); *DePaoli v. Abbott Labs.*, 140 F.3d 668, 673 (7th Cir. 1998). Beginning with *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980), decided under the Rehabilitation Act, the lower courts have also consistently held that an individual is not actually disabled in the major life activity of working unless her condition precludes her from working in a class of jobs, such that there is "a significant reduction in a person's real work opportunities." *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996). In this case, Petitioners' pertinent training, knowledge, skills, and abilities all relate to flying as commercial airline pilots. Hence, under the class of jobs requirement, Pilots are not *actually* disabled with respect to the major life activity of working unless significantly restricted in the ability to obtain work as airline pilots.

Crucially, however, Pilots need not prove that they are excluded by all employers within the relevant class in order to show that United *regarded* them as disabled with respect to the major life activity of working. Under the "regarded as" prong, only the misperceptions of the specific employer are relevant. The House Judiciary Report instructed that the "regarded as" prong applies "whether or not the employer's perception [is] shared by others in the field." House Judiciary Report, at 30. The EEOC included this same language in its Interpretive Guidance. 29 C.F.R. pt. 1630, App. § 1630.2(l), at 350 (1998).

There is a basic distinction between an individual's actual ability to work, and an employer's misperceptions of her ability. In adopting the class of jobs requirement, the court in *E.E. Black* was careful to observe that the requirement could not be used to defend an employer's perceptions

not shared by others in the industry. The court explained that "it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process." 497 F. Supp. at 1100. The Fifth Circuit emphasized this distinction in *Deane v. Pocono Medical Center*, 142 F.3d at 144, in the context of a nurse who alleged that her employer regarded her as disabled in the class of jobs of nursing due to her severe wrist injury:

> The second ground [for summary judgment] – that Deane's subsequent employment in the field of nursing demonstrated that she was not substantially limited in the major life activity of working – confuses her actual impairment with PMC's misperception thereof. Deane's subsequent work history could, at most, reflect her lack of an actual disability, and it therefore sheds no light whatever on whether, at the time of her termination, PMC regarded her impairment as substantially limiting her ability to work.

A contrary approach would eliminate any possible claim that an employer regarded an individual as substantially limited in the major life activity of working. A claim would be available only to an individual who could prove that she was actually foreclosed from obtaining a job within the relevant class with any employer. Since this evidentiary showing is sufficient to demonstrate that an employee is *actually* disabled in working, *see Arline*, at 283 n.10 (an impairment that prevents one from working is a disability, even if it affects no other major life activity), the "regarded as" prong would become superfluous. Employers would thus be rewarded for applying discriminatory criteria so far removed from actual job requirements that they are unique in the industry.

Even the court below did not go so far, conceding that "[i]t is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters." J.A. 71 (citing *Cook v. State of R.I., Dept. of Mental Health, Retardation and Hosps.*, 10 F.3d 17, 25-26 (1st Cir. 1993)).

2. United Regarded Pilots As Unfit To Perform A Class Of Jobs.

Limiting attention only to United's perceptions, it is apparent that Pilots have stated a claim under the "regarded as" provision of the ADA. United has judged Pilots unfit for any of its flying positions, and there is no valid distinction between United's positions and others within the same class of jobs.

The court below correctly stated, but did not apply, the rule that "in order to establish a disability under the 'regarded as' prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." J.A. 70. Pilots have alleged exactly that. United disqualifies Pilots from any of its thousands of piloting positions, without regard to aircraft model, route, or flying conditions. J.A. 25-26, ¶ 38(f), (g).

This is not a case of an employer excluding an individual only from certain of its positions within the class of jobs. *Compare Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 (5th Cir. 1995) (employer removed welder with injured arm from positions requiring climbing, but continued to employ for other welding jobs); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (5th Cir. 1998) ("American attempted to place Sherrod in other positions for which American did not deem her disqualified due to her back condition."). Rather, United imposes a blanket prohibition covering not just one position, or a particular subcategory, but all of its jobs within the relevant class. *Compare Coleman v. Southern Pac. Transp. Co.*, 997 F. Supp. 1197, 1204-06 (D. Ariz. 1998) (holding that defendant regarded plaintiff as disabled, where it barred him from any of its locomotive transportation positions due to perceived safety risks from his monocular vision).

United argues that it does not regard Pilots as substantially limited in the ability to work within the relevant class of jobs, even though it disqualified them from every position it offers within that class. Pilots can conceive of only one

circumstance in which an employer might arguably be able to advance this position – where all of the employer's job openings are distinguishable from jobs in the same class offered by other employers. *See, e.g., Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (holding acrophobic utility systems repairer not disabled, where he was able to work for other employers, but was unable to work for one employer whose plant required work at particularly high altitudes).[40] For example, in *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147 (7th Cir. 1998), the defendant regarded plaintiffs as unable to drive sleeper trucks, but not other types of trucks in its fleet. If defendant's entire fleet had been composed of *only* sleeper trucks, and defendant had thus rejected plaintiffs for all of its positions, it might still have argued that it did not regard plaintiffs as unfit to perform all jobs within the class. The defendant would have no such defense, however, if it disqualified plaintiffs from both types of driving positions. *See Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997) (finding genuine issue of fact whether employer regarded driver with injured knee as disabled where it denied him any truck driving positions).

The Court today need not decide the validity of such an argument. Pilots have expressly alleged that there is *not* anything unique about United's pilot positions that distinguishes them from positions at other airlines. *Id.*

In affirming dismissal of Pilots' action, the lower court implicitly assumed this allegation to be untrue. The court described United's piloting positions as "a particular specialized job or a narrow range of jobs." J.A. 72 (quoting 29

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[40] The EEOC has essentially adopted this view, instructing its investigators that, where an employer applies a disqualifying criterion such as a vision requirement, the investigator should determine whether the criterion pertains uniquely to a peculiar job or work site of that particular employer, or pertains to a class of jobs. EEOC Order No. 915.002, 2 Compliance Manual, § 902-51 to -52 (1997). In the latter circumstance, the employer regards those who do not qualify as substantially limited in working. *Id.* at 902-52.

C.F.R. § 1630, App. § 1630.2(j), at 349 (1998)). This remarkable factual conclusion is entirely at odds with Pilots' allegation that United's positions are indistinguishable from those of other airlines.[41] The court attempted to justify its conclusion by quoting the EEOC example that "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." *Id.* This example, however, cuts directly *against* the lower court's conclusion. United employs a great host of pilots to serve as both pilots and co-pilots, on both passenger routes and courier routes, and it has barred Petitioners from filling *any* of those positions. Of course, another employer might hire Pilots for one of those positions, but that is irrelevant to United's perception that Pilots are unfit for any piloting position.[42] Whatever another employer might believe, United regards Pilots as substantially limited in the major life activity of working,

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[41] The lower court borrowed the phrase "global airline pilot" from Pilots' complaint, and described this as too narrow to constitute a class of jobs. J.A. 71. This was merely a descriptive phrase, however, reminding the court that United is a global airline, whose pilots garner more prestige and higher pay than has ever been available to Petitioners. The phrase cannot fairly be read to suggest that the requirements of United's positions are in any way distinguishable from those of other airlines. Pilots expressly alleged to the contrary.

[42] The lower court's confusion may be attributable to the fact that the EEOC's example was given in the context of the actually disabled prong, rather than the "regarded as" prong. It is, by any account, a peculiar choice of examples. The FAA imposes the same vision requirements on all commercial pilots, whether acting as pilots or co-pilots, on passenger routes or courier routes. 14 C.F.R. §§ 67.103, 67.203 (1998). Pilots are not aware of any airline that makes a distinction between the vision requirements of any of these positions. As they have alleged, United certainly does not.

because it perceives Pilots' poor uncorrected vision "to foreclose generally the type of employment involved." *Forrisi v. Bowen*, 794 F.2d at 935.[43]

Even if it were not directly at odds with Pilots' factual allegations, the lower court's distinction between United's positions and those of other airlines is nonsensical. United contends that to allow Pilots to fly its aircraft would be a direct threat to the safety of its passengers. In the face of this argument, it cannot credibly claim that it believes Pilots are nevertheless qualified to fly for United's competitors. This is akin to the school board in *Arline* arguing that it did not want plaintiff infecting the children in its district but had no objection to plaintiff infecting children in another district. It is doubtful that such a bizarre argument could ever prevail; it surely cannot support dismissal of a claim at the pleadings stage.

Pilots are at a loss as to what more they could allege to support a claim that United regarded them as substantially limited in working within a class of jobs. They have alleged that United has judged them unfit for the occupation for which they have trained, based upon nothing but unfounded stereotype. The decision below thus "permit[s] the precise evil that [the "regarded as" prong] was designed to eliminate." *United States v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 124 (1978). Unless this aspect of the ADA is to be a dead letter, this Court should reverse the dismissal of their claim under the "regarded as" provision.

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[43] Indeed, because United based its decision solely on Pilots' uncorrected vision, the Court may infer that United regarded Pilots as disabled for *any* type of employment requiring uncorrected vision in either eye better than 20/200. *See Sicard*, 950 F. Supp. at 1430 (observing that the defendant perceived its employees' uncorrected vision as central to their ability to perform work, and few jobs can be performed with 20/200 vision).

CONCLUSION

United rejected Pilots' applications for employment because Pilots are disabled or because United regards them as disabled. Pilots' allegations thus state a prima facie case under the ADA. Of course, this does not mean they are necessarily entitled to relief. United will have the opportunity to meet its burden of showing a direct threat to safety, or some other defense. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973) (once a prima facie case of discrimination is established, the burden shifts to the employer to demonstrate a nondiscriminatory justification). As it did in both *Arline* and *Bragdon*, the Court should remand this case for consideration of the direct threat issue.

Respectfully submitted this 22nd day of February, 1999.

VAN AARON HUGHES
Counsel of Record for Petitioners
TUCKER K. TRAUTMAN
KRISTIN L. WETENKAMP
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, Colorado 80202
Telephone: (303) 464-9409

Attorneys for Petitioners

No. 97-1943

Supreme Court, U.S.
FILED
MAR 24 1999
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, ET AL.,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
Brownstein Hyatt Farber & Strickland, P.C.
Twenty-second Floor
410 Seventeenth St.
Denver, CO 80202
(303) 534-6335

ROY T. ENGLERT, JR.
MIRIAM R. NEMETZ
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether fully correctable nearsightedness is a "disability" under the Americans with Disabilities Act.

2. Whether a global air carrier's decision to require pilot applicants to have 20/100 or better uncorrected vision automatically subjects it to litigation over whether it "regard[s] as" disabled persons who do not meet its vision standards.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Karen Sutton and Kimberly Hinton were plaintiffs in the district court and appellants in the court of appeals. Respondent United Air Lines, Inc., was defendant in the district court and appellee in the court of appeals. There were no other parties below.

The parent of United Air Lines, Inc., is UAL Corporation. United Air Lines, Inc., has no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. CONGRESS DID NOT INTEND THE ADA TO COVER PEOPLE WITH CORRECTABLE NEARSIGHTEDNESS 7

A. Correctable Nearsightedness Is A Common Condition That Does Not Seriously Affect The Lives Of Those Who Have It 10

B. The ADA Protects A Discrete Minority Of Substantially Impaired Individuals, Not Those With Widespread, Trivial Impairments Like Correctable Nearsightedness 12

II. AN IMPAIRMENT DOES NOT "SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY" IF IT CAN BE CORRECTED EASILY 21

Table of Contents - Continued

Page

A. This Court Should Reject The EEOC's Directive To Ignore Corrective Measures When Making The Disability Determination 22

1. The EEOC interpretive guidance does not merit special deference 23

2. The EEOC's directive to ignore corrective measures conflicts with the plain meaning of the statute 26

3. Petitioners' and their *amici*'s arguments supporting the EEOC interpretation are unconvincing 32

B. The Legislative History Does Not Justify An Expansion Of The ADA To Require Disregard For Corrective Measures 39

C. At The Very Least, The ADA Should Be Read To Exclude Individuals With Widely Shared And Easily Correctable Impairments 43

III. AN INDIVIDUAL REJECTED FROM A PARTICULAR JOB FOR FAILURE TO MEET PHYSICAL STANDARDS IS NOT NECESSARILY "REGARDED AS DISABLED" BY THE EMPLOYER 44

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases:

Arnold v. *United Parcel Serv., Inc.*, 136 F.3d 854 (1st Cir. 1998) 8, 36
Beecham v. *United States*, 511 U.S. 368 (1994) 29
Blanchard v. *Bergeron*, 489 U.S. 87 (1989) 42
Board of Governors v. *Dimension Fin. Corp.*, 74 U.S. 361 (1986) 26
Bowers v. *Multimedia Cablevision, Inc.*, 1998 U.S. Dist. LEXIS 19319 (D. Kan. Nov. 3, 1998) 37
Bragdon v. *Abbott*, 118 S. Ct. 2196 (1998) 8, 25, 35
Bridges v. *City of Bossier*, 92 F.3d 329 (5th Cir. 1996), cert. denied, 519 U.S. 1093 (1997) 46
Burbank v. *City of Idaho Falls*, 1996 U.S. App. LEXIS 24127 (9th Cir. Sept. 11, 1996) 49
Bushendorf v. *Freightliner Corp.*, 13 F.3d 1024 (7th Cir. 1993) 33
Cehrs v. *Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998) 31, 44
Chandler v. *City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) 18, 28, 46, 48
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) . . . 23, 31
City of Chicago v. *EDF*, 511 U.S. 328 (1944) 42
Cline v. *Fort Howard Corp.*, 963 F. Supp. 1075 (E.D. Okla. 1997) 7, 17
Coghlan v. *H.J. Heinz Co.*, 851 F. Supp. 808 (N.D. Tex. 1994) 31
Cook v. *Rhode Island*, 10 F.3d 17 (1st Cir. 1993) 46
Daugherty v. *City of El Paso*, 56 F.3d 695 (5th Cir. 1995) . . 48
Deas v. *Alternative Addiction Treatment Concepts, Inc.*, 152 F.2d 471 (5th Cir. 1998) 36, 46
Denson v. *Village of Bridgeview*, 19 F. Supp. 2d 829 (N.D. Ill. 1998) 7
Director, OWCP v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995) 33

Table of Authorities - Continued

Page(s)

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East Bay Mun. Util. Dist. v. *Department of Commerce*, 142 F.3d 479 (D.C. Cir. 1998) 33
Fallacaro v. *Richardson*, 965 F. Supp. 87 (D.D.C. 1997) . . 7
Forrisi v. *Bowen*, 794 F.2d 931 (1986) 43
General Elec. Co. v. *Gilbert*, 429 U.S. 125 (1976) 23, 25
Gilday v. *Mecosta County*, 124 F.3d 760 (6th Cir. 1997) 28, 44
Gordon v. *E.I. Hamm & Assoc.*, 100 F.3d 907 (11th Cir. 1996), cert. denied, 118 S. Ct. 630 (1997) 30
Halperin v. *Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997) 16, 27
Haworth v. *Procter & Gamble Mfg. Co.*, 1998 WL 231062 (D. Kan. Apr. 30, 1998) 35
Headrick v. *Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir. 1994) 24
Hirschey v. *FERC*, 777 F.2d 1 (D.C. Cir. 1985) 42
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 39
INS v. *Phinpathya*, 464 U.S. 183 (1984) 27
Jasany v. *United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) 18
Joyce v. *Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996) . 7
K-mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 29
Katz v. *City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996) . . . 31
Kelly v. *Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996) 16
Kienast v. *Frank*, 1990 WL 711359 (EEOC Mar. 27, 1990) . 8
Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 48
Norris v. *Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418 (N.D. Cal. 1996) 19
O'Connor v. *Consolidated Coin Corp.*, 517 U.S. 308 (1996) . 15
Padilla v. *City of Topeka*, 708 P.2d 543 (Kan. 1985) 7, 17, 43

Table of Authorities - Continued

Page(s)

Peacock v. *County of Marin*, 953 F. Supp. 306 (N.D. Cal. 1997) 7
Pennsylvania Dep't of Corrections v. *Yeskey*, 118 S. Ct. 1952 (1998) 21
Public Employees Retirement Sys. v. *Betts*, 492 U.S. 158 (1989) 26
Reynolds v. *Brock*, 815 F.2d 571 (9th Cir. 1987) 42
Rodriguez v. *United States*, 480 U.S. 522 (1987) 33
Roth v. *Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995) 18, 32
Ryan v. *Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998) 28
Santiago v. *Temple Univ.*, 739 F. Supp. 974 (E.D. Pa. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991) . . . 18
Schluter v. *Industrial Coils, Inc.*, 928 F. Supp. 1437 (W.D. Wis. 1996) 7, 28
School Board of Nassau County v. *Arline*, 480 U.S. 273 (1987) 34, 50
Sharon v. *Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986) 8
Shiflett v. *GE Fanuc Automation Corp.*, 960 F. Supp. 1022 (W.D. Va. 1997), aff'd, 151 F.3d 1030 (4th Cir. 1998) 43
Sicard v. *Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996). . 8
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 25
Smith v. *Norton Indus.*, 17 F. Supp. 2d 1094 (D.S.D. 1998) . 8
Southeastern Comm. College v. *Davis*, 442 U.S. 397 (1979) . 23
Still v. *Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997) 18
Sweet v. *Electronic Data Sys., Inc.*, 1996 U.S. Dist. LEXIS 5544 (S.D.N.Y. Apr. 26, 1996) 7, 18
Teamsters v. *Daniel*, 439 U.S. 551 (1979) 23
Testerman v. *Chrysler Corp.*, 1997 U.S. Dist. LEXIS 21392 (D. Del. Dec. 30, 1997) 7, 35
Thomas v. *Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994) 31

Page(s)

Trembczsynski v. *Calumet City*, 1987 WL 16604 (N.D. Ill., Aug. 31, 1987) 7
Tudyman v. *United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984) 46
United Savings Ass'n v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) 29
United States v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113 (1849) 29
United States v. *Wilson*, 503 U.S. 329 (1992) 28
United States Nat'l Bank of Oregon v. *Independent Ins. Agents of Am.*, 508 U.S. 439 (1993) 29
Venclauskas v. *Connecticut*, 921 F. Supp. 78 (D. Conn. 1995) 7
Walker v. *Aberdeen-Monroe County Hosp.*, 838 F. Supp. 285 (N.D. Miss. 1993) 18
Washington v. *HCA Health Serv.*, 152 F.3d 464 (5th Cir. 1998), petition for cert. pending, No. 98-1365 . . . . . 8, 41, 44
West Virginia Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83 (1991) 12
Williams v. *Channel Master Satellite, Inc.*, 101 F.3d 346 (4th Cir. 1996), cert. denied, 520 U.S. 1240 (1997) 16, 30
Wilkins v. *County of Ramsey*, 983 F. Supp. 848 (D. Minn. 1997), aff'd, 153 F.3d 869 (8th Cir. 1998) 31
Wilson v. *Pennsylvania State Police Dep't*, 964 F. Supp. 898 (E.D. Pa. 1997) 7
Witter v. *Delta Air Lines*, 138 F.3d 1366 (11th Cir. 1998) . . 49
Wong Yang Sung v. *McGrath*, 339 U.S. 33 (1950) 39

Statutes, Rules and Regulations:

28 U.S.C. § 1254(1) 1
Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* 8, 42

Page(s)

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* . . . . . *passim*
42 U.S.C. § 12101(a) 13, 14, 45
42 U.S.C. § 12102(1) 2, 40
42 U.S.C. § 12102(2) 2, 3, 6, 16, 27
42 U.S.C. § 12111(9) 40
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42 U.S.C. § 12112(b) 15
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H.R. 4498, 100th Cong., § 2(a) (1988) 20
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Page(s)

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STATISTICAL ABSTRACT OF THE UNITED STATES 138 (115th ed. 1995) 21

Page(s)

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U.S. Air Force Academy, 1998-1999 CATALOG 12
U.S. Navy, MANUAL OF THE MEDICAL DEPARTMENT, Article 15-65 (Change 107, Oct. 29, 1992) 12
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135 Cong. Rec. E1575-01 (daily ed. May 9, 1989) 21

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 45-74) is reported at 130 F.3d 893. The opinion of the district court (J.A. 30-44) is unreported.

JURISDICTION

The judgment of the court of appeals (J.A. 75) was entered on November 26, 1997. A petition for rehearing was denied on March 3, 1998. J.A. 76-77. The petition for a writ of certiorari was filed on June 1, 1998, and granted on January 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case requires the Court to decide whether more than 100 million Americans who have nearsightedness that is correctable by ordinary glasses or contact lenses are covered by the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Petitioners Karen Sutton and Kimberly Hinton sued respondent United Air Lines, Inc., under the ADA after United refused to consider their applications for employment as pilots because their vision failed to meet United's standards for visual acuity. The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. J.A. 30-44. The court of appeals affirmed. J.A. 45-74.

1. The complaint alleged that petitioners, who are identical twins, are experienced airline pilots working for regional air carriers. J.A. 19. Petitioners alleged that it was their "life long goal to fly for a major air carrier." J.A. 17. According to the complaint, in 1992 both petitioners submitted applications and were interviewed for pilot positions at United, but were rejected because their uncorrected vision failed to meet United's minimum standards for pilots. J.A. 20-23. The complaint alleged that United requires pilots to have uncorrected distance vision of 20/100, a standard that "was modeled on military requirements for pilot training." J.A. 25. Petitioners contended that "United's policy blocks [them] from an entire class of employment: global airline pilot" (*ibid.*), and that "other global carriers had similar or higher minimum standards, thus blocking [petitioners] from seeking the same class of employment elsewhere in the industry." J.A. 26.

According to the complaint, petitioners each have uncorrected vision of 20/200 or worse in one eye and 20/400 or worse in the other, but have 20/20 vision when using corrective lenses. J.A. 23. Petitioners alleged that without their glasses they "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television, or shopping in public places." J.A. 24. They admitted, however, that "[w]ith corrective measures" they "function identically to individuals without a similar impairment." *Ibid.*

2. The ADA forbids discrimination

> against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1996). The statute defines "disability * * * with respect to an individual" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

Id. § 12102(2). Petitioners alleged that they "are substantially limited in the major life activity of seeing" and that United "regards [them] as having a substantially limiting impairment." J.A. 23, 24.

3. The district court ruled that the complaint failed to allege facts sufficient to establish that petitioners had a "disability" under either the first or the third clause of 42 U.S.C. § 12102(2). With regard to the first clause, the court ruled that petitioners were not significantly restricted in the major life activity of either seeing or working. J.A. 36-37. The court pointed out that, "with their corrective lenses, [petitioners] are able to function identically to individuals without a similar impairment" (*ibid.*), and ruled that "the need for corrective eyewear is commonplace and does not substantially limit major life activities." J.A. 37. Observing that petitioners were employed as commercial airline pilots, the court ruled that their "common moderate vision impairment, although certainly an undesirable inconvenience, does not substantially limit their ability to work within the meaning of the ADA." J.A. 40. The court explained generally that "the ADA was intended to protect

> only a limited class of persons * * * who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared." J.A. 40-41.

With regard to petitioners' claim that they were "regarded as" disabled under the third clause of 42 U.S.C. § 12102(2), the court stated that "[t]here is no support for the allegation that United, based on stereotype, myth, or unsubstantiated fears, regards [petitioners] as substantially impaired in the major life activity of seeing." J.A. 41. Stating that the test for whether United regarded petitioners as substantially limited in working "is whether the impairment, as perceived, would affect the individual's work across the spectrum of the same or similar jobs," the court observed that:

> [a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on the employee's ability to work in general.

J.A. 42. The court then ruled that "[a]t most, [petitioners] can establish that United regarded them as unable to satisfy the requirements of a particular passenger airline pilot position." *Ibid.*

4. The court of appeals affirmed. J.A. 45-74. The court ruled that petitioners' poor uncorrected vision was an "impairment" (J.A. 58) and then analyzed whether it "substantially limits one or more of the[ir] major life activities." Comparing petitioners' vision to "the vision of the average person in the general population" (J.A. 60), the court of appeals ruled that they were not substantially limited in the major life activity of seeing. While recognizing that petitioners' "uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing," the court ruled that "this is a hypothetical situation." J.A. 65. The court stated (J.A. 65-66):

> In fact, [petitioners] do not limit their normal daily activities to those that could be performed with their uncorrected vision. [Petitioners] admit that with their corrective measures they "function identically to individuals without a similar impairment." [Petitioners] merely don their eye glasses (or contact lenses) and go about all their daily activities in the same or similar condition, manner, or duration as the average person in the general population.

The court of appeals rejected petitioners' argument that EEOC interpretive guidance required the court to evaluate their vision impairment without considering the effect of their corrective lenses, ruling that the guidance "is in direct conflict with the plain language of the ADA." J.A. 64. "In making disability determinations," the court stated, "we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures." *Ibid.*

The court of appeals also ruled that United did not "regard" petitioners as disabled in the major life activity of working. The court stated, "[a]n employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that the individual is incapable of performing a particular job." J.A. 68. To establish such a claim, the court explained, "an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." J.A. 70. Characterizing the complaint as claiming that United had disqualified petitioners from the job of "global airline pilot," the court ruled that "this description is too narrow to constitute a 'class of jobs.'" J.A. 71. The court observed that the provision of the ADA protecting individuals who are "regarded as" disabled "seeks to remedy perceived disabilities that, like actual disabilities, extend beyond the isolated mismatch of employer and employee." J.A. 73.

SUMMARY OF ARGUMENT

Until a recent spate of district court decisions, courts construing both the ADA and its predecessor had not regarded correctable nearsightedness as a disability. Even now, courts — and petitioners and the Government — show obvious unease at the prospect of including such a common and easily treatable condition, so far removed from the paradigms that animated the ADA, as a disability. Advocates for that position resort to abstraction and talk about the supposed implications for other disabilities if mitigating measures are used to exclude the nearsighted from the Act's coverage.

There is good reason for that discomfort and avoidance. More than 100 million Americans use glasses or contact lenses to correct their vision. Approximately one-quarter of the nation's adult population could not drive without vision correction. Corrected vision is so commonplace in American society that for almost all purposes

(other than a few jobs in which good uncorrected vision may be especially critical) vision is considered in its corrected state.

The findings of fact in the ADA show that Congress did not intend correctable nearsightedness to be considered a disability. The 43 million people the statute was supposed to cover are dwarfed by the number of people with correctable vision conditions. Nearsighted people are not a discrete and insular minority, historically segregated and isolated, characterized by societal disadvantage. The structure and provisions of the Act confirm Congress's intent. The Act protects ***only*** the disabled, not everyone, and the phrase "substantially limits * * * major life activities" was meant to narrow its scope to those with ***functional*** impairments. Petitioners and the Government try to avoid these obvious conclusions by asserting that petitioners' nearsightedness is more severe than "average," but that is a distinction without a difference because petitioners function identically to those with less severe nearsightedness who nonetheless need corrective lenses to see clearly. And the legislative history shows that, in trying to assess the impact the statute would have, Congress and its advisors made specific assumptions about which individuals with vision impairments would be covered, and considered only those who are limited by the impairment ***in its corrected state***.

The Court should require that the impairment be considered in its corrected state, particularly when the "impairment" is nearsightedness, and in fact more generally. The EEOC's contrary interpretive guidance should not be followed. Interpretive guidance does not receive the same deference as regulations. The efforts here to avoid that principle by arguing that the guidance was put out for notice and comment should fail. Even if the guidance ***generally*** was subject to notice and comment (itself a debatable proposition), the ***specific*** provision requiring a hypothetical inquiry, in which mitigating measures are disregarded, was not. It was added ***after*** the comment period at the urging of disability rights groups. In any event, the interpretive guidance is internally inconsistent, and the portion on which petitioners rely contradicts the plain meaning of the statute. The arguments that petitioners and their *amici* have offered as to why their reading makes sense are ingenious, but they rely on meanings that the words will not bear, anomalies that do not exist, and supposed absurdities that are not as absurd as the implications of petitioners' own position.

The legislative history will not do the work that the statute's text cannot. A snippet or two from committee reports supports petitioners' position (although not in the context of nearsightedness), but other snippets point strongly in the opposite direction, including some on which petitioners themselves rely. At the least, the ADA should be read to exclude persons with widely shared and easily correctable "impairments" such as petitioners' nearsightedness. If the sources bearing on the question in this case are deemed too contradictory to support a flat rule that mitigating measures are always considered — and we submit that the text of the statute, including the non-hypothetical phrase "substantially limits," overwhelms any supposed contradictory indications — then the Court should frankly acknowledge the difficulty and exclude nearsightedness from any general rule to ignore mitigating measures, as ***all*** reliable indicators of congressional intent on the precise point at issue suggest.

Petitioners have not pleaded a litigable issue under the "regarded as" prong of the definition of disability. United regards them as less than ideally suited for its passenger pilot positions, not as categorically unfit to fly airplanes. In any event, working ***as a pilot*** is not a "major life activity"; working is. Petitioners have not pleaded that United regards them as unfit to work.

ARGUMENT

Petitioners' nearsightedness constitutes a "disability" if, and only if, it is "a physical * * * impairment that substantially limits one or more of [their] major life activities" or they are "regarded as having such an impairment." 42 U.S.C. § 12102(2)(A), (C).[1] Petitioners do not allege in the literal words of the statute that their nearsightedness "substantially limits" them, but they contend that it is enough that it ***would*** so limit them if they did not wear corrective lenses. They also contend that United's use of their uncorrected vision as a criterion for limiting its pool of pilot applicants proves, *ipso facto*, that United regarded them as disabled.

[1] The contention of amicus AFL-CIO that petitioners have "a record of such an impairment" (42 U.S.C. § 12102(2)(B)) is not properly before the Court, having not been raised in the proceedings below, in the petition for certiorari, or in petitioners' brief on the merits. It is also plainly incorrect. Because the "record" must be "of such an impairment," *i.e.*, one that "substantially limits" a major life activity, subsection (B) adds nothing to the claims of persons, like petitioners, who assert that they are no more and no less impaired or limited than they ever were in the past.

Whether corrective measures are to be taken into account in answering the questions posed by the statute is a subsidiary issue that the Court may have to consider, but the overarching issue is whether these (and similar) petitioners are within the reach of the statute, not a consideration of mitigating measures in the abstract. Cf. Pet. Br. 27 (referring to "what treatments, medications, or other measures each disabled person must undergo," but avoiding reference to eyeglasses or contact lenses), 34 (referring to "medication or other means"). We therefore start in Part I with the question petitioners relegate to a short section near the end of their brief (Pet. Br. 38-40): What do the text and history of the ADA tell us about ***nearsightedness***? In Part II, we show that subsection (A) does not reach petitioners because their nearsightedness does not substantially limit their major life activities. In Part III, we show that subsection (C) does not reach petitioners because their allegations (taken as true) do not show that United regarded them as disabled.

I. CONGRESS DID NOT INTEND THE ADA TO COVER PEOPLE WITH CORRECTABLE NEARSIGHTEDNESS

Even those who support the broadest interpretation of the ADA are uneasy with the notion that people who wear glasses to correct nearsightedness are "disabled." Until recently, most courts that had considered the issue had determined that correctable nearsightedness is not a disability.[2] The ADA was modeled on the Rehabilitation

[2] See *Testerman* v. *Chrysler Corp.*, 1997 U.S. Dist LEXIS 21392 (D. Del. Dec. 30, 1997); *Cline* v. *Fort Howard Corp.*, 963 F. Supp. 1075 (E.D. Okla. 1997); *Schluter* v. *Industrial Coils, Inc.*, 928 F. Supp. 1437, 1447 (W.D. Wis. 1996); *Sweet* v. *Electronic Data Sys., Inc.*, 1996 U.S. Dist. LEXIS 5544 (S.D.N.Y. Apr. 26, 1996); *Venclauskas* v. *Connecticut*, 921 F. Supp. 78 (D. Conn. 1995); *Joyce* v. *Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996); *Trembczynski* v. *Calumet City*, 1987 WL 16604 (N.D. Ill. Aug. 31, 1987); *Padilla* v. *City of Topeka*, 708 P.2d 543 (Kan. 1985). In the wake of appellate rulings that corrective measures must be disregarded when determining whether an individual has a disability, a number of district courts have recently treated correctable nearsightedness as disability. See *Denson* v. *Village of Bridgeview*, 19 F. Supp. 2d 829 (N.D. Ill. 1998); *Fallacaro* v. *Richardson*, 965 F. Supp. 87 (D.D.C. 1997); *Wilson* v. *Pennsylvania State Police Dep't*, 964 F. Supp. 898 (E.D. Pa. 1997); *Peacock* v. *County of Marin*, 953 F. Supp. 306 (N.D. Cal.

Act of 1973, 29 U.S.C. § 701 *et seq.*, which had been in force 17 years without any statement by a government agency or holding by a court that nearsightedness constitutes a "disability" or "handicap."[3] The EEOC itself had ruled that a vision impairment "fully corrected by wearing * * * lenses" was not a disability. *Kienast* v. *Frank*, 1990 WL 711359, *6 (EEOC Mar. 27, 1990).

Even courts holding that mitigating measures are irrelevant to the disability determination have expressed discomfort with applying that rule to nearsightedness.[4] Some have suggested an exception for nearsightedness. The court in *Arnold* v. *United Parcel Serv., Inc.*, 136 F.3d 854, 863 (1st Cir. 1998), held that impairments should be assessed without regard to mitigating measures, but noted that it "might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses," because "[t]he availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of 'minor, trivial impairment[ ],' * * * that would not be a disability under the ADA." *Id.* at 866 n.10 (quoting S. Rep. No. 101-116, at 23 (1989)); see also *Washington* v. *HCA Health Servs.*, 152 F.3d 464, 471 (5th Cir. 1998), petition for cert. pending, No. 98-1365.

1997); *Sicard* v. *Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996).

[3] In *Sharon* v. *Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986), which petitioners cite, it was "not disputed that Sharon is handicapped" (*id.* at 1401), so the court had no occasion to say what it was about Sharon's vision impairment that made him handicapped. Because even his ***corrected*** vision had "a large and dangerous blind spot resulting from the structure of the [bioptic] lenses," *id.* at 1402, the case in no way supports the proposition that persons with fully correctable vision impairments were considered handicapped in ***any*** Rehabilitation Act case or commentary. Petitioners concede that no other Rehabilitation Act authority supports considering nearsightedness as a handicap or disability. Pet. Br. 25-26 & n.28; cf. *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202, 2205, 2207-2208 (1998) (relying on Rehabilitation Act practice and regulations in construing ADA).

[4] *E.g.*, *Smith* v. *Norton Indus.*, 17 F. Supp. 2d 1094, 1099 (D.S.D. 1998) ("it would seem to be unfair * * * to conclude that uncorrected vision due to the aging process would translate into a disability within the meaning of the ADA").

The briefs of petitioners and their *amici* appear sensitive to the incongruity of petitioners' claims to disabled status, and revealingly have devoted remarkably few of their pages to discussing the facts of this case. The Government, too, has been tentative in its embrace of petitioners' position. When petitioners sought certiorari, the Government recommended that the Court not grant plenary review in this case; now that the Court has done so anyway, the Government supports petitioners but tries to reassure the Court that a decision in their favor would be confined to the severely myopic.

This discomfort with petitioners' case, we submit, is rooted in two circumstances. First, nearsightedness is a widely shared trait normally viewed as a minor inconvenience rather than a serious problem of the sort that Congress addressed in the ADA. Petitioners themselves apparently never suffered a single hardship stemming from their nearsightedness until they failed to meet United's standards for uncorrected visual acuity. Second, because pilots for global air carriers daily hold in their hands the lives of hundreds of passengers, it seems reasonable to expect them to meet standards of physical fitness that many Americans might be unable to satisfy. In short, it is surprising that petitioners might be considered "disabled" under the ADA merely because their widely shared and easily correctable visual deficiency has excluded them from one highly competitive job that understandably demands reliable eyesight.

The ADA does not entirely prohibit — or even require justification of — all employment decisions based on physical characteristics, nor does it give employees with minor impairments the right to sue employers. Instead, Congress defined a discrete group facing physical limitations significantly more serious than those experienced by the average person and provided them with special protections to further their full integration into the economy. If those protections are accorded to the more than 100 million Americans who suffer from correctable nearsightedness, then the central framework of the ADA — its protection of a discrete group of persons whose impairments are substantial — will be severely diluted.[5]

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[5] In focusing on the specific impairment at issue in this case, respondent does not question in any way the holding of the court of appeals that corrective measures always should be taken into account in determining whether an individual is "disabled" within the meaning of the ADA. We support that holding at pp. 22-42, *infra*, and we agree with the arguments being made in support of that holding by the respondent in *M. phy* v.

A. Correctable Nearsightedness Is A Common Condition That Does Not Seriously Affect The Lives Of Those Who Have It

More than 100 million Americans — more than ***51%*** of persons ages 3 and over, and ***89%*** of men and women over age 45 — use glasses or contact lenses to correct their vision. See National Center for Health Statistics (NCHS), *Eye Care Visits and Use of Eyeglasses or Contact Lenses: United States 1979 & 1980*, Vital & Health Stat., Series 10, No. 145, at 1, 7, 28 (1984); see also National Advisory Health Council, *Vision Research — A National Plan: 1999-2003*, U.S. Dep't of Health and Human Servs., NIH Pub. No. 98-4120, at 7 (1998) ("[M]ore than 100 million people need corrective lenses to see properly."). About half of those — approximately 24% of American adults — have uncorrected distance vision worse than 20/40. See NCHS, Jean Roberts, *Binocular Visual Acuity of Adults: United States 1960-62*, Series 11, No. 3, at 3 (Table A) (1964) (24.2% in the early 1960s); David J. Lee, et. al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 OPHTHALMOLOGY 552, 554 & Table 1 (1998) (range of 21.3-31.2% depending on race and ethnicity). Rates of nearsightedness (myopia) increase significantly with rises in education and income. Robert D. Sperduto, et al., *Prevalence of Myopia in the United States*, 101 ARCH. OPHTHALMOLOGY 405, 407 (1983); Joanne Katz, et al., *Prevalence and Risk Factors for Refractive Errors in an Adult Inner City Population*, 38 INVESTIGATIVE OPHTHALMOLOGY & VISUAL SCIENCE 334, 336-339 & Figure 2 (Feb. 1997). Contact lenses are worn by 26 million Americans. National Ass'n of Attorneys General, *Seventeen Attorneys General File Comments on FTC's Spectacle Prescription Release Rule*, 5 NAAG ANTITRUST REP., at 7, 9 (Sept./Oct. 1997).

Even moderate nearsightedness makes it difficult to perform many modern activities without corrective measures. For example, a sizable majority of the States require drivers of private vehicles to have visual acuity (corrected or uncorrected) of 20/40 or better. Lawrence E. Decina, et al., *Visual Disorders and Commercial*

United Parcel Serv., Inc., No. 97-1992. But we focus on nearsightedness specifically because it is the disability involved in this case, and because we recognize the possibility that this Court could decide this case on narrower grounds than those elaborated below. See pp. 43-44, *infra*.

Drivers, U.S. Dep't of Trans. Pub. No. FHWA-MC-92-003, HCS-10/1-92(200)E, at A-15 (Nov. 1991). Thus, most of the one-quarter of American adults whose uncorrected distance vision is worse than 20/40 cannot legally drive without their glasses or contact lenses.

Because corrective lenses are so popular and effective in remedying common visual deficiencies, visual impairments are customarily defined assuming the use of corrective lenses. In countless settings, only those individuals whose problems ***cannot be remedied*** with lenses are considered visually impaired. See National Advisory Health Council, *Vision Research - A National Plan: 1999-2003*, at xvii ("Vision impairment can be defined as any chronic visual deficit that impairs everyday function ***and is not correctable by ordinary eyeglasses or contact lenses.***") (emphasis added); see also NCHS, *Current Estimates From the National Health Interview Survey, 1995*, Vital & Health Stat., Series 10, No. 199, at 147 (1998) (asking survey participants if they have any "trouble seeing with one or both eyes EVEN when wearing glasses"); NCHS, *Current Estimates From the National Health Interview Survey, 1982*, Vital Health Stat., Series 10, No. 150, at 149 (1985) (same). The Social Security Administration defines visual impairment as ***corrected*** visual acuity between 20/40 and 20/200, and defines blindness as ***corrected*** visual acuity of 20/200 or worse. See James M. Tielsh, *The Prevalence of Blindness and Visual Impairment Among Nursing Home Residents in Baltimore*, 332 NEW ENG. J. MED. 1205, 1205-1207 (1995). The World Health Organization defines visual impairment as ***corrected*** visual acuity between 20/40 and 20/400 and blindness as ***corrected*** visual acuity of 20/400 or worse. *Ibid.*

For nearly every purpose, good corrected vision is viewed as indistinguishable from good uncorrected vision. In every State, persons who use corrective lenses are permitted to obtain driver's licenses, boating licenses, hunting licenses, and even pilot's licenses. Many of the country's most highly paid professional athletes use corrective lenses. There is no social stigma associated with the use of corrective lenses. Movie stars, CEOs, anchormen, Senators, and Supreme Court Justices use corrective lenses. There is no history of isolation and segregation of the nearsighted.

Because corrective lenses are so effective, nearsighted people can and do perform nearly every type of job in our economy, without any need for accommodation. In a narrow range of jobs, however, the possibility that corrective lenses will fail at a critical time

is viewed as presenting unique risks. Accordingly, some employers require firefighters, law enforcement officers, and pilots to meet visual acuity standards for both their ***corrected*** and ***uncorrected*** vision. Employers, including governmental employers, sometimes reach the judgment that even a small risk of mishap should be avoided in light of the gravity of a vision failure at an acutely dangerous moment such as the emergency operation of a plane or a high-speed chase of criminals. The United States itself employs such standards. For example, the Air Force requires its pilots to have uncorrected distance vision of 20/50 or better; the Navy has an even higher standard, insisting that its pilots have 20/30 or better uncorrected vision. See U.S. Air Force Academy, 1998-1999 CATALOG 170; U.S. Navy, MANUAL OF THE MEDICAL DEPARTMENT, Article 15-65 (Change 107, Oct. 29, 1992).[6] FBI and Secret Service agents must have uncorrected distance vision no worse than 20/200 and 20/60, respectively. See Federal Bureau of Investigation, *Frequently Asked Questions About the FBI*, Question 12 <http://www.fbi.gov/faq/fbifaq.htm>; U.S. Secret Service, *Special Agent Requirements* <http://www.ustreas.gov/usss/opportunities_agent.htm>.

B. The ADA Protects A Discrete Minority Of Substantially Impaired Individuals, Not Those With Widespread, Trivial Impairments Like Correctable Nearsightedness

The language, structure, and legislative history of the ADA plainly reflect its purpose of protecting from discrimination and promoting the employment of persons whose serious physical or mental impairments prevent them from functioning at the level of the average person. As this Court has stated, "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). When Congress enacted and the President signed the ADA, they plainly intended to ***preserve*** certain elements of employer discretion. In particular, they chose to allow employers to consider physical characteristics in making

[6] Until 1994, the Federal Aviation Administration required commercial airline pilots to have uncorrected distance visual acuity of 20/100 or better, unless they obtained a waiver. The American Medical Association recommended retention of an uncorrected vision standard. A.L. Engelberg and T.C. Doege, *Review of Part 67 of the Federal Air Regulations and the Medical Certification of Civilian Airmen*, Vol. 1, at 1-7 (1986).

employment decisions affecting individuals whose minor impairments (such as correctable nearsightedness) place them well within the norm of working Americans.

1. The findings of fact that preface the ADA comprise a revealing discussion of the specific societal problem that Congress and the President sought to address by enacting the statute. Congress and the President intended to improve the circumstances of a limited group of significantly impaired people who had suffered from discrimination, isolation, and underemployment — not to give people with widespread and trivial impairments the right to seek judicial review of employers' job qualification standards.

The ADA's very first finding of fact states that ***"some 43,000,000 Americans*** have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (emphasis added). That figure — which on its face excludes the more than 100 million Americans who wear corrective lenses — closely tracks contemporaneous government estimates of the size of the disabled population. Those figures included 12.8 million Americans with ***uncorrectable*** visual impairments, but did not include the far greater number who have ***correctable*** vision problems. See p. 20, *infra*.

The findings describe a statutorily protected group that plainly does not include people who wear glasses or contact lenses to correct nearsightedness. The findings describe individuals with disabilities as "a ***discrete and insular minority*** who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." 42 U.S.C. § 12101(a)(7) (emphasis added). They further note that, "historically, society has tended to isolate and segregate individuals with disabilities." *Id.* § 12101(a)(2). Those descriptions of the protected class — descriptions that are a prominent part of the text that each legislator considered in voting on the legislation, and that the President considered in deciding to sign it — would have led any reasonable reader to conclude that the statute does not concern itself with people with correctable vision conditions, who comprise close to half of the population, have suffered no isolation, and likely have disproportionately high representation among the most powerful people in our nation.

The findings also emphasize the chronic underemployment and social disadvantages of the disabled, stating that they, "as a group, occupy an inferior status in our society, and are severely disadvan-

taged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6). They observe that discrimination against the disabled "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* § 12101(a)(9). Nearsighted people are, as a class, neither disadvantaged nor underemployed, but in fact have higher than average education and income. Petitioners themselves apparently have had no difficulty securing employment, and in their chosen field.

The findings also emphasize the persistent problem of pervasive discrimination against the disabled. 42 U.S.C. § 12101(a)(2), (3). But there is simply no argument that those who use ordinary corrective lenses have been the victims of widespread discrimination in the United States, in employment or otherwise.

In sum, those who wear glasses and contact lenses are not a discrete and insular minority saddled with a history of discrimination, exclusion, or underemployment. Nor, given the overwhelming numbers of people who would be added to the ranks of the "disabled" if nearsightedness is deemed a disability, would those statements remain true even as generalizations. ***Approximately 25% of all Americans are nearsighted*** (Sperduto, *supra* at 45), ***and more than half of the population uses glasses or contact lenses to correct nearsightedness or other vision problems***. Nearsighted individuals face no unique challenges, no social disadvantages, and no difficulty obtaining employment. Although some nearsighted persons have been excluded from a narrow range of jobs because the possible failure of their corrective lenses presents special risks, the average person with good vision also finds some jobs out of reach because of other physical traits. Thus, nearsighted people were clearly not the targets of the ADA's goals "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" (42 U.S.C. § 12012(a)(8)) for the disabled.

2. The structure and detailed provisions of the ADA are consistent with its stated purpose of addressing the problems of a discrete and insular minority of seriously impaired individuals. Rather than subjecting to judicial scrutiny ***all*** employment decisions based on physical characteristics, the Act defines a protected class of disabled people and imposes obligations on employers ***only with respect to that class***. In that respect, the ADA differs from laws like Title VII that entirely bar decisions based on race or gender. The

ACLU correctly observes (Br. 19 n.12) that Title VII "covers every single person in this country because everyone has a race and a gender," but it errs in suggesting that the ADA is similarly encompassing. Because the ADA — both in its findings and its substantive provisions requiring proof of a "disability" before any other question is reached — establishes a threshold through which only a discrete minority of the population can pass, it is more like the Age Discrimination in Employment Act, which bars decisions based on age that affect people forty or older, but allows such decisions when they affect younger people. See generally *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). By conscious design, physical characteristics and age have ***not*** been completely removed from employers' permissible decisionmaking processes, nor has Congress broadly required employers to justify every instance in which physical characteristics or age is taken into account. Rather, Congress has chosen to keep the law — and litigation — within bounds by limiting statutory protection to a defined class, despite the possibility that a characteristic might be misused against someone who is not a member of that class.

Because the ADA preserves the rights of employers to make decisions based on their employees' physical characteristics except when the employee is "disabled" ***and*** the employer lacks an affirmative defense, the statute's definition of the protected class performs a crucial gatekeeping function. Once an individual is classified as having a disability, his relationship with actual and potential employers undergoes a sea change.

As noted above, Congress did not intend the ADA to interfere generally with employers' rights to use whatever selection criteria they decide are appropriate for any job (subject, of course, to civil rights laws restricting the misuse of race, gender, age, and other often-irrelevant criteria). If employment selection criteria screen out individuals who meet the definition of "disabled," however, they must be justified as job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6). Likewise, unless and until the ADA is triggered, Congress has not required that employers modify jobs or equipment to suit specific needs of their employees. By contrast, unless it would cause the business "undue hardship," the Act requires employers to provide accommodations — including job restructuring and the modification of facilities — for qualified individuals with disabilities. *Id.* § 12112(b)(5)(A). The definition of

who is disabled under the ADA determines which individuals can lay claim to these and other special protections.

To limit the ADA's cost to employers, its intrusion into the employment relationship, and its litigation-generating potential, Congress defined the protected class in a manner consistent with the statute's goals. The Act narrowly defines "disability" as "a physical or mental impairment that ***substantially limits*** one or more of the ***major life activities***" of an individual. 42 U.S.C. § 12102(2)(A) (emphasis added). The "ordinary or natural meaning" of the phrase "requires that an impairment *significantly restrict* an individual's ability to perform a major life activity." *Halperin* v. *Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (emphasis in original). Thus, the ADA covers only those whose impairments present a significant challenge in their lives. As many courts have ruled outside the context of visual impairments or corrective measures, the ADA does not protect individuals with minor impairments. See, *e.g.*, *Williams* v. *Channel Master Satellite, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (inability to lift more than 25 pounds because of back injury not a disability), cert. denied, 520 U.S. 1240 (1997); *Kelly* v. *Drexel Univ.*, 94 F.3d 102, 106 (3d Cir. 1996) (moderate restriction on ability to walk not a disability).

The EEOC's regulations defining "substantially limited" accord with Congress's intention to protect only those whose impairments cause them to function below the norm of working Americans. According to the regulations, "substantially limited" means:

> (i) Unable to perform a major life activity ***that the average person in the general population*** can perform; or
>
> (ii) ***Significantly restricted*** as to the condition, manner or duration under which an individual can perform a particular major life activity ***as compared to*** the condition, manner, or duration under which ***the average person in the general population*** can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (emphasis added). By requiring that an individual be significantly restricted as compared with the average person in the general population before he or she is considered disabled, the regulations exclude from the protected class individuals whose physical limitations do not place them outside the mainstream, and thus carry out Congress's intention to preserve the existing relationship between such people and employers.

The plain language of the ADA's definition of disability powerfully establishes that people like petitioners who have correctable nearsightedness are not within the statute's protected class. Under both the natural meaning of "substantially limited" and the EEOC's regulatory definition, the impairment must "significantly restrict" the manner in which petitioners see as compared to the way "the average person in the general population" sees. That plainly does not describe petitioners' circumstances. With their corrective lenses, petitioners have perfect visual acuity and are restricted from no activities that require them to see. Wearing corrective lenses, moreover, neither imposes additional restrictions on petitioners nor distinguishes them from "the average person in the general population," who also needs corrective lenses to see. Accordingly, there is "simply no evidence that [petitioners have] 'a physical or mental impairment which substantially limits one or more of such person's major life activities.'" *Padilla* v. *City of Topeka*, 708 P.2d 543, 550 (Kan. 1985) (applicant for police officer position whose nearsightedness was correctable to 20/20 was not "handicapped" within the meaning of the Rehabilitation Act).

Petitioners claim that their "major life activity of seeing is restricted in that they cannot perform it without the aid of corrective measures." Pet. Br. 31. But the plain language of the disability definition requires that the "major life activity" of "seeing" be analyzed functionally, not by considering the mechanics or quality of vision in isolation. Some lower courts have recognized

> that a visual impairment which hinders, or makes it more difficult for an individual to function at full visual capacity, does not amount to a substantial limitation on one's ability to see ***where the evidence suggests the individual can otherwise conduct activities requiring visual acuity***.

Cline v. *Fort Howard Corp.*, 963 F. Supp. 1075, 1080 (E.D. Okla. 1997) (emphasis added); see also, *e.g.*, *Padilla*, 708 P.2d at 550 (noting that the plaintiff "has worn glasses since his grade school days and has testified to no problems or limitations in his activities"). Any other approach would render the definition tautological — *i.e.*, one with a visual impairment that impairs vision is disabled — and would essentially read the limiting phrase of the disability definition out of the statute with respect to visual and other sensory impairments.

After performing similar analyses, many courts have ruled under both the ADA and its predecessor, the Rehabilitation Act, that individuals with correctable vision problems are not disabled. As one court noted, "Moderate vision impairment[s], although certainly an undesirable inconvenience, do[ ] not substantially limit an individual's ability to see, to read, or to work." *Sweet* v. *Electronic Data Sys., Inc.*, 1996 U.S. Dist. LEXIS 5544, at *14 (S.D.N.Y. Apr. 26, 1996); see also *id.* at *16 (with ***corrected*** vision of 20/80 in one eye, plaintiff's "ability to engage in the major life activity of seeing has been limited, but not substantially limited").[7] Indeed, several courts have held that people with ***uncorrectable*** vision problems are not disabled, as long as they can see well enough to function within the range of the average person.[8] It would be exceedingly odd if the ADA embraced persons with completely correctable nearsightedness because they ***would*** see badly if they failed to wear their glasses, but excluded those with ***uncorrectable*** vision impairments who actually function less well than such persons do.

Petitioners and their *amici* attempt to bring their impairment

[7] See also cases cited in note 2, *supra*; cf. *Walker* v. *Aberdeen-Monroe County Hosp.*, 838 F. Supp. 285 (N.D. Miss. 1993) (plaintiff whose vision was correctable to 20/30 with steroids and eye drops was not disabled). Several of these courts concluded that correctable nearsightedness was not even an "impairment" for purposes of the Act. Cf. *Jasany* v. *United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985) ("Characteristics such as average height or strength that render an individual incapable of performing particular jobs are not covered by the statute because they are not impairments.") (footnote omitted). The court of appeals rejected United's argument that nearsightedness is not an impairment; we do not press the argument here because, even if petitioners' nearsightedness is an impairment, it does not substantially limit a major life activity.

[8] See *Still* v. *Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (5th Cir. 1997) (per curiam) (plaintiff, who "drives both cars and motorcycles, and is a certified marksman," is not disabled because he is blind in one eye; "although his peripheral vision is limited by his partial blindness, [plaintiff] is still able to perform normal daily activities"); *Chandler* v. *City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) (plaintiff's uncorrectable poor vision in one eye did not render him "handicapped" under the Rehabilitation Act); *Roth* v. *Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995); *Santiago* v. *Temple Univ.*, 739 F. Supp. 974, 978 (E.D. Pa. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991).

within the definition of disability, and to suggest a limit to the potential sweep of a ruling in their favor, by arguing that their nearsightedness is exceptionally severe. Pet. Br. 38-40; Gov't Br. 11; AIDS Action Br. 24. The perhaps greater-than-average severity of petitioners' nearsightedness is a distinction without a difference, however. In their everyday lives, petitioners function identically to the more than half of Americans whose uncorrected eyesight is sufficiently poor that they must use corrective lenses to perform their daily activities. And it is not at all clear that petitioners' ***uncorrected*** nearsightedness would limit their activities substantially more than milder (and more common) uncorrected nearsightedness would. As noted above, most States require visual acuity of 20/40 or better to obtain a driver's license. Thus, if petitioners were deemed disabled, then all persons with uncorrected vision worse than 20/40 would also be disabled, because they (like petitioners) would be able to claim that they cannot drive without corrective lenses. See *Norris* v. *Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1433 n.13 (N.D. Cal. 1996) ("the jury could have reasonably felt that, at least in California, driving is a major life activity"). There is no escaping the conclusion that a decision that petitioners are "disabled" would dramatically expand the reach of the ADA and unmoor it from the goals that motivated its enactment.[9]

3. Although the statutory language and structure alone clearly establish that Congress did not intend to include people with correctable nearsightedness within the ADA's protected class, the legislative history confirms that conclusion. As the district court noted below, the legislative history reflects that "the type of visual impairment contemplated by the legislation is of a degree beyond that correctable by glasses or contact lenses." J.A. 41.

First, the express references to visual impairments in the committee reports contemplate serious visual impairments that cannot be remedied by ordinary corrective lenses. The House

[9] Petitioners' (and the Government's) effort to win this case by gerrymandering a class that includes them but excludes many others, in fact, gives rise to severe anomalies. Consider, for example, a person whose 20/50 uncorrected vision might be considered "average," but who for some reason ***cannot*** use lenses to improve his vision to anything better than 20/50. Such a person might be left uncovered by the ADA, with the one-two punch of consideration in an unmitigated state ***only*** and comparison to the "average" person in that state (Gov't Br. 10-12).

Report notes that:

> For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [*sic*] visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess., at 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 346.

Second, the legislative history confirms that the 43 million disabled Americans cited in the statute's findings ***did not include people with correctable nearsightedness.*** The ADA's findings of fact, including their estimate of the number of disabled people in America, had their origin in a report prepared by the National Council on the Handicapped (now the National Council on Disability) entitled *On the Threshold of Independence*. The report included proposed legislation that began with the finding that "some thirty-six million Americans have one or more physical and mental disabilities." *On the Threshold*, at 27 (Jan. 1988).[10] The Council derived that number from a 1986 Census Bureau study indicating that 37.3 million Americans over the age of 15 had difficulty performing basic physical activities. *Id.* at 9. The report makes it clear that the Census Bureau was counting only people with ***uncorrectable*** visual impairments. *Ibid.* ("Some 12.8 million people, or 7.1 percent of the population studied, had trouble seeing words and letters in ordinary newsprint, ***even with glasses or contact lenses.***") (emphasis added).[11]

The first versions of the ADA proposed in the Congress included virtually the same findings as the Council's draft, including the 36 million figure. See S. 2345, 100th Cong., § 2(a) (1988);

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[10] The conference reports make clear that the Congress was relying heavily on the Council. See H.R. Conf. Rep. No. 101-558, 101st Cong., 2d Sess., at 81 (1990) ("The conferees intend to recognize the National Council on Disability as the impetus, force, and originator of the initial legislation for the Americans with Disabilities Act."); H.R. Conf. Rep. No. 101-596, 101st Cong., 2d Sess., at 85 (1990) (same).

[11] This methodology is consistent with that long used by the National Center for Health Statistics (NCHS) to determine the number of people with visual impairments and with the definition of visual impairment given by the National Advisory Eye Council. See p. 11, *supra*.

H.R. 4498, 100th Cong., § 2(a) (1988). A year later, Representative Coelho reintroduced the ADA and noted that, although "the last U.S. census numbered the disabled at 36 million[,] [e]stimates indicate that the number has risen to 43 million since then." 135 Cong. Rec. E1575-01 (daily ed. May 9, 1989). Recent Census Bureau reports show that the updated figure, like the earlier one, excluded people with correctable vision conditions. See STATISTICAL ABSTRACT OF THE UNITED STATES 138 (Table 209) (115th ed. 1995) (listing approximately 11 million people as visually disabled).

Third, the legislative history underscores Congress's belief, reflected in the findings of fact, that the disabled tend to be poorer, less well educated, and lower on the social scale than people without disabilities. The House Report states, for example:

> Compared with persons without disabilities, persons with disabilities are much poorer, have far less education, have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life.

H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 445, 465 (footnote omitted). As discussed above, it is well documented that individuals with nearsightedness are (as a group) ***wealthier and more highly educated*** than average. See p. 10, *supra*.

Thus, this is not a case in which petitioners merely seek to apply the ADA in a "situation[ ] not expressly anticipated by Congress," where an unambiguous text "demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 118 S. Ct. 1952, 1956 (1998). Rather, petitioners' highly doubtful reading of the statutory text would cause the statute to ***contradict*** positive indications in the legislative history that Congress ***did*** anticipate application of the statute to vision impairments and did not intend that it apply to fully correctable nearsightedness.

II. AN IMPAIRMENT DOES NOT "SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY" IF IT CAN BE CORRECTED EASILY

Petitioners concede that they can see perfectly well with their corrective lenses. They neither identify any functional impairment of their vision when they use corrective lenses nor contend that the use of corrective lenses itself causes them any actual difficulties.

Instead, they claim that they are disabled because they ***would*** be substantially limited in seeing ***if*** they did not wear their glasses. Relying on statements in interpretive guidance issued by the EEOC, they ask this Court to adopt a general rule that courts may ***never*** consider the effect of corrective measures when deciding whether an individual is disabled. In other words, they argue that the disability determination should depend purely on the ***hypothetical*** effects of the impairment in the absence of corrective measures, rather than the ***actual*** effects of the impairment in the real world.

To accept the EEOC's guidance and apply it to this case, however, would effect a sweeping expansion of the ADA. As discussed above, Congress enacted the ADA to address the problems of a discrete and insular minority of individuals who, because of their significant impairments, had faced discrimination, isolation, and underemployment. Both the plain language of the statute and its overall structure and meaning reflect the congressional purpose to limit the Act's protection to a discrete group of physically disadvantaged people. There is no support in the statute for the view that Congress meant to include within the ADA's protected class the more than 100 million Americans who, like petitioners, have readily correctable impairments that have a trivial impact on their lives. Accordingly, this Court should reject both the EEOC's guidance and petitioners' claims.

A. This Court Should Reject The EEOC's Directive To Ignore Corrective Measures When Making The Disability Determination

Petitioners rest their claim to ADA coverage on statements in interpretive guidance that the EEOC published along with its regulations under the ADA. In the interpretive guidance, the EEOC stated that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures, such as medication, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998).[12] Petitioners argue that this Court must

[12] The interpretive guidance also states that the determination of whether an individual has an impairment should be made without regard to mitigating measures. "For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the conditions were correctable through the use of a hearing aid." 29 C.F.R. pt. 1630, App. § 1630.2(h), at 347 (1998). We agree that the use of mitigating measures is irrelevant to the determination of whether there is an underlying impairment. Mitigating measures are instead relevant to the next stage of the analysis, which addresses the ***effects*** of the impairment, and determines whether the impairment "substantially limits a major life activity" of the particular individual.

defer to the EEOC's rule, and, for purposes of the disability determination, treat petitioners as though their glasses did not exist.

"Although an agency's interpretation of a statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'" *Southeastern Comm. College* v. *Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters* v. *Daniel*, 439 U.S. 551, 566 n. 20 (1979)) (rejecting HEW regulations implementing Rehabilitation Act). The EEOC interpretation on which petitioners rely should be rejected because it conflicts with the plain meaning of the ADA, and its structure and purpose.

1. The EEOC interpretive guidance does not merit special deference

The interpretation at issue is not a regulation promulgated under the Administrative Procedure Act pursuant to a congressional delegation of authority, but appears in guidelines published in an appendix to regulations implementing Title I. "[C]ourts properly may accord less weight to such guidance than to administrative regulations which Congress has declared have the force of law." *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976).

The regulations to which the guidance is appended contain definitions of each part of the statutory definition of disability, including the phrases "physical or mental impairment," "major life activities," and "substantially limits." 29 C.F.R. § 1630.2(h), (i), (j). The regulatory definitions do not mention corrective measures. The appended guidance document, however, states that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures, such as medication, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998).

Petitioners argue that this interpretive statement should be accorded full deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because it was subject to notice-and-comment rulemaking. Pet. Br. 15-16; see also 97-1992 Gov't Br. 19. That assertion is misleading. First of all, publishing guidance in the Federal Register along with a final or proposed rule is not the same as issuing a regulation for formal notice and comment under the APA. See *Headrick* v. *Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (comment to final regulations was "a purely interpretive rule, unpromulgated under the [APA]," and accordingly the court was "in no way bound to afford it any special deference"). The EEOC so recognized in publishing ***this*** interpretive guidance, inviting comment on only a portion of it, and not on the portion relevant here. See 56 Fed. Reg. 8578 (1991).

More important, the draft guidance published in the Notice of Proposed Rulemaking that contained the regulations ***did not contain the statement on which petitioners rely so heavily.*** 56 Fed. Reg. 8578, 8593 (1991). As originally proposed, the sentence at issue read in full: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis." *Ibid.* Only when it published its regulations and the guidance in final form did the agency add to that sentence the thirteen-word phrase that petitioners contend requires a ruling that they are "disabled." 56 Fed. Reg. 35,726, 35,727 (1991). The agency explained that it had revised the guidance to

> respond to comments from disability rights groups, which were concerned that the discussion [of the meaning of "substantially limits"] could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures.

Id. at 35,728.[13] Thus, the regulated community had no notice that it would be subject to a categorical rule that corrective measures

[13] The Government suggests that the EEOC should receive credit for "consistently interpreting" the rule, and describes what seem to be two separate occasions when the agency addressed the issue. 97-1992 Gov't Br. 18-19. The two statements described by the Government, however, appeared in the very same document, which contained the final version of the regulations and the appendix (which later were published in the Code of Federal Regulations) and an explanatory preamble.

were never relevant to the disability determination. In fact, only "disability rights groups" had the opportunity to consider the import of, and comment on, the interpretation at issue here.[14]

Nor is it true, as petitioners claim (Pet Br. 16), that the guidance at issue is entitled to high level of deference accorded to an agency's interpretation of its own regulations. The language at issue does not construe the regulations. At most, it adds an additional gloss (which the EEOC did not see fit to include in its regulations) to the ***statutory*** definition of disability. While we contend that the guidance is entitled to ***less*** deference than a ***regulation*** interpreting a statute that the agency has been entrusted to administer, it surely is not entitled to receive ***more*** deference through treatment as an interpretation of a regulation that the agency has written.

"[W]ell-reasoned" views of an agency do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bragdon*, 118 S. Ct. at 2207 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)). The weight to be accorded the interpretation, however, depends on, among other things, "the thoroughness evident in its consideration." *Skidmore*, 323 U.S. at 140. "The EEOC guideline in question does not fare well under these standards." *General Elec.* v. *Gilbert*, 429 U.S. at 142. As noted above, the guideline appears to have been added to the interpretive guidance as a result of pressure from advocacy groups with an interest in the broadest possible interpretation of the ADA. Groups having an interest in cabining the statute had no opportunity to point out the problems inherent in a rule categorically barring consideration of mitigating measures —

[14] The version of the interpretive guidance published with the proposed rule did note that "[a]n individual who uses artificial legs would * * * be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices," and that "a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication." 56 Fed. Reg. at 35,741. But those examples are consistent with the consideration of corrective measures in other instances, and are far from the strict rule requiring disregard of even the most effective and least burdensome remedies that petitioners now argue was issued for notice and comment. The EEOC acknowledged as much when it stated that its discussion of "substantially limits" could be "misconstrued" to exclude people with controlled impairments.

for example, that people like petitioners with impairments having a trivial impact on their lives would be protected.

Moreover, as the court of appeals noted (J.A. 64-65), the interpretation is at odds with other parts of the EEOC's regulation and guidance. First, the guidance explains that "an employee [who] has ***controlled*** high blood pressure that is not substantially limiting" would be covered under the "regarded as" prong of the disability definition if his employer viewed him as substantially limited. 29 C.F.R. § 1630, App. § 1630.2(*l*) para. 6 (emphasis added). That statement strongly conveys that it is the employee's "control" of his high blood pressure that renders it "not substantially limiting."[15]

Second, in discussing the term "substantially limits," the interpretive guidance states that "whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather ***on the effect of that impairment on the life of the individual.***" *Id.* § 1630.2(j) para. 2 (emphasis added). As the court of appeals aptly explained, "the EEOC recognized that it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA." J.A. 65. It is surely hard to square the EEOC's language with an absolute rule that corrective measures must always be disregarded.

2. The EEOC's directive to ignore corrective measures conflicts with the plain meaning of the statute

Whatever weight this Court decides to grant the EEOC's views, the guidance should be rejected because it does violence to the language and purposes of the statute. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986), quoted in *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 43 (1990); see also *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."). The conclusion that Congress

[15] Petitioners claim that "the phrase suggests that controlled high blood pressure may or may not be substantially limiting, depending upon the severity of the underlying condition (without medication)." Pet. Br. 15 n.16. But that explanation renders the EEOC's use of the word "controlled" entirely superfluous, and is unconvincing.

did not intend to preclude the consideration of corrective measures emerges from a review of the text of the disability definition and the statute's structure and enumerated purposes.

1. As the court of appeals ruled, the portion of the EEOC's guidance on which petitioners rely must be rejected because it is "in direct conflict with the plain language of the ADA." J.A. 64. "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The definition does not end with the word "impairment." Congress could easily have drafted a statute that prohibited discrimination based on any physical impairment (subject to the affirmative defenses), but it did not do so.[16] The definition of disability must be read in light of the express intent to sort out impairments meriting protection under the ADA from those that do not.

This Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984). What separates protected from unprotected impairments is the requirement that the impairment "substantially limit[ ] one or more of the major life activities of such individual." Each part of that phrase, when given its natural meaning, lends support to the conclusion that corrective measures cannot be ignored when deciding whether an individual is disabled.

First, as noted above, the "ordinary or natural meaning" of the phrase "substantially limits" requires that an impairment "*significantly restrict* an individual's ability to perform a major life activity." *Halperin*, 128 F.3d at 199. By including only significant restrictions, the definition ***excludes*** insignificant, unimportant, or trivial restrictions. Even if the need to use a corrective device to perform a major life activity is a "limitation" or "restriction" on that activity, it is not necessarily a significant restriction. A person who can perform a life activity with no functional deficit by using a simple, painless, and inexpensive corrective measure does not face a "significant restriction" in that life activity. To rule otherwise is "to read out of the act's first definition of disability the re-

[16] In fact, the draft legislation originally proposed to Congress by the National Council on the Handicapped would have prohibited discrimination based on any impairment, but Congress chose to add the "substantially limits" requirement. See *On The Threshold*, at 28-29.

quirement that it applies only to those persons who are 'substantially limited' in major life activities." *Schluter* v. *Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

A directive to ignore corrective measures also offends the form of the operative limiting phrase. By employing the phrase "substantially limits one or more major life activities" in the present indicative form, Congress conveyed its concern with substantial limitations ***that actually exist***. See *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). Thus, the ADA does not authorize a hypothetical inquiry into a set of facts that might exist if an individual abandoned the corrective measures that actually minimize or eliminate the effects of his impairment. As the court of appeals stated, the disability determination is "concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures." J.A. 64. See also *Gilday* v. *Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) ("I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication").

Disregarding available mitigating measures also defies the statutory command to examine the effect of the impairment on "the major life activities ***of such individual.***" As the court of appeals ruled, that phrase conveys the need for an individualized analysis of the effects of the impairment that is rooted in the facts of each particular case. See *Ryan* v. *Grae & Rybicki, P.C.*, 135 F.3d 867, 872 (2d Cir. 1998) ("the determination whether an impairment 'substantially limits' a major life activity is fact specific"); *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1396 (5th Cir. 1993) (recognizing that "the effect of a given type of impairment * * * can vary widely from individual to individual"). Nothing in the statute permits courts to exclude from this case-by-case factual analysis information concerning measures that the individual uses to correct an impairment when such information indisputably is relevant to the actual effect of the impairment on an individual's life.

Finally, to disregard the individual's use of corrective measures also ignores the definition's use of the term "life activities." By defining disability with respect to limitation on "life activities," Congress conveyed its intention to protect those individuals who are

substantially limited in ***doing*** the things that other people ***do***. In other words, Congress cared about impairments that had functional, as opposed to existential, consequences. The EEOC guidance ignores that language and elevates form over function.

2. The plain meaning of the phrase "substantially limits a major life activity" can be discerned, not only by giving those words their ordinary and natural meaning, but also by considering their function in the context of the entire Act. As this Court has stated:

> Statutory construction * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Ass'n v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); see also *Beecham* v. *United States*, 511 U.S. 368, 372 (1994) ("the plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences"); *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (quoting *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."); *K mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

Even if the words "substantially limits" were ambiguous read in isolation, their meaning would be clarified by considering their function in the context of the entire Act. If "the statute, as a whole, clearly expresses Congress' intention," the Court "decline[s] to defer to [the agency's] interpretation." *Dole* v. *Steelworkers*, 494 U.S. at 42. Only an interpretation that excludes from the ADA's protected class people whose physical limitations have been successfully corrected "is compatible with the rest of the law."

First, a rule that ignores the effects of corrective measures would be inconsistent with the statutory findings that preface the ADA. See 42 U.S.C. § 12101. This Court has found such congressional statements of purpose "useful * * * [in] detailing Congress' purposes in enacting [a] statute" and thereby clarifying the meaning

of one of its provisions. *Dole* v. *Steelworkers*, 494 U.S. at 36-37 (invalidating OMB interpretation of provision of the Paperwork Reduction Act because it did not further "Congress' enumerated purposes"). As discussed above (at 13-14), the statutory findings make clear that Congress was concerned with providing a remedy for Americans whose functional limitations had caused them to suffer discrimination, isolation, and underemployment. The congressional finding that 43 million Americans were disabled was based on statistics that focused on such practical limitations. See pp. 20-21, *supra*. It would offend Congress's purpose as expressed through its statutory findings to sweep under the umbrella of the ADA persons whose impairments have virtually no practical impact on their lives — especially since such an interpretation would cause explosive growth of the population covered by the statute.

Second, the EEOC rule offends Congress's intention to draw a rational line around a protected class of persons whose severe impairments leave them most in need of the Act's remedies. A directive to ignore mitigating measures artificially blinds the statutory sorting mechanism to important factors determining the severity of an impairment, so that the statute ends up protecting individuals who function far better than many who are excluded. For example, a person with an ***uncorrectable*** visual impairment that does not rise to the level of a disability would be excluded from the statute, but a person who can see perfectly well using glasses would be included. See cases cited in note 8, *supra*. Similarly, a person with an uncorrectable back injury that leaves him or her moderately restricted in lifting would be excluded from the statute (see *Williams*, 101 F.3d at 349), but a person with potentially serious arthritis rendered asymptomatic by medication would be included. Congress should not lightly be deemed to have intended such an irrational result.

Trying to separate "the disease [from] its treatment" creates other problems as well. If the EEOC's interpretive guidance were followed to the letter, than a plaintiff who had an impairment that was not substantially limiting but who experienced debilitating side effects from its treatment would not be covered by the ADA. Yet the purposes of the Act surely are served by extending protection to such people. *Gordon* v. *E.I. Hamm & Assocs., Inc.*, 100 F.3d 907 (11th Cir. 1996) (considering whether plaintiff, whose lymphoma did not substantially limit a major life activity, was substantially limited by the effects of his chemotherapy treatments), cert. denied,

118 S. Ct. 630 (1997). Conversely, someone who suffered a dangerous episode of a treatable health problem (such as a heart attack or stroke) would thereafter always be considered disabled, because he might have died without treatment. Courts do not now automatically grant such persons protection under the ADA. See *Katz* v. *City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir. 1996) (explaining that plaintiff would be considered disabled after surviving a heart attack and angioplasty procedures only if his post-treatment limitations were "permanent or persisted on a long-term basis").

Thus, even if the statute is ambiguous, the EEOC's directive to ignore mitigating measures is not "a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866. By contrast, considering ***all*** relevant facts concerning an individual's impairments, including the effects of mitigating measures, permits consistent and rational decisions concerning who is covered by the statute and who is not. Individuals (like petitioners) whose otherwise substantial impairments are corrected through reliable, effective, and non-burdensome measures will not be considered disabled. See *Wilkins* v. *County of Ramsey*, 983 F. Supp. 848, 854 (D. Minn. 1997) (person with medicated depression who "suffers no symptoms" "as long as she takes her medication" was not disabled), aff'd, 153 F.3d 869 (8th Cir. 1998). Individuals whose treatments leave them substantially impaired will be considered disabled. See *Thomas* v. *Davidson Academy*, 846 F. Supp. 611, 617-618 (M.D. Tenn. 1994) (student whose serious autoimmune disorder remained dangerous despite extensive ongoing medical treatment was disabled). Individuals with substantial impairments that are treatable but not perfectly correctable may or may not be considered disabled, depending on the effectiveness of the treatment and the limitations imposed by the treatment itself. See *Cehrs* v. *Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (genuine issue of material fact existed as to whether plaintiff's treated psoriasis was a disability where plaintiff suffered effects of both the disease and her weekly medication); *Coghlan* v. *H.J. Heinz Co.*, 851 F. Supp. 808, 814 (N.D. Tex. 1994) (genuine issue of material fact existed as to whether plaintiff's treated diabetes was a disability because, among other things, plaintiff claimed that his insulin injections caused episodes of hypoglycemia). Those with treatable impairments will be fairly compared with those who have untreatable impairments, according

to the actual limitations each actually experiences. Congress cannot have intended any other result.

3. Petitioners' and their *amici*'s arguments supporting the EEOC interpretation are unconvincing

Petitioners and the *amici* supporting their position argue both from the text of the Act and from its ostensible ends that the disregard of mitigating measures is consistent with the Act or even necessary to effectuate its purposes. Those arguments are unconvincing at best, and at worst suggest a drift (if not an outright leap) toward an interpretation of the Act that would simply prohibit employment actions based on the physical characteristics of employees. None of them rescues petitioners' claims.

1. Petitioners make several textual arguments in favor of the EEOC's rule. First, they contend, the phrase "substantially limits" ***necessarily*** encompasses "the inability to perform a major life activity except with a corrective device." Pet. Br. 31. But "not every impairment that ***affect[s]*** an individual's major life activities is a substantially limiting impairment." *Roth* v. *Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (emphasis added; footnote omitted). As noted above, a person who uses a corrective device to ameliorate a substantially limiting impairment may well continue to be substantially limited in a major life activity, either because the device does not completely correct the impairment, or because the corrective measure itself imposes new limitations. Nothing in the statutory language, however, gives privileged status to the need for corrective devices in the assessment of what constitutes a substantial limitation, much less suggests that classification as disabled flows *ipso facto* from the need for such corrective measures.

Second, petitioners argue that the Tenth Circuit's rule "adds terms to the Act that Congress chose not to employ." Pet. Br. 34. It is petitioners, however, who seek to add terms to the disability definition and change its verb form: their rule would change the phrase "substantially limits" to "would without correction substantially limit." Nothing in the statute justifies such an alteration.

Finally, petitioners claim that Congress could have expressly excepted correctable impairments from the statute, but chose not to do so. Pet. Br. 35. The fact is that the disability definition draws a line between impairments that substantially limit major life activities and those that do not. Both correctable and uncorrectable

impairments may fall on either side of that line. The dichotomy between correctable and uncorrectable impairments is a construct alien to the statute's language and purposes, and little meaning can be attributed to the absence of language addressing the issue.

2. Petitioners and their *amici* also claim that the EEOC rule is consistent with and necessary to effectuate the purposes of the ADA. They insist that the ADA must be interpreted broadly because it is a remedial statute. *E.g.*, Pet. Br. 29; ACLU Br. 5. "That principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively." *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995) (citation omitted).[17] Moreover, as this Court has stated, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular goal is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original). That admonition is particularly apt in this case, since expansion of the definition of disability simultaneously ***contracts*** the employer's general discretion to make employment decisions based on physical characteristics — a "competing value[ ]" that the Congress that enacted the ADA regarded as important. See pp. 14-16, *supra*.

More specifically, petitioners and their *amici* argue that a broad definition of disability is required because people have the right to prove that they are qualified for the positions from which they are rejected because of their impairments. According to petitioners, "Congress structured the ADA to define broadly who is disabled, but limited its remedies only to those who can demonstrate they are qualified to perform the work they seek." Pet.

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[17] See also, *e.g.*, *East Bay Mun. Util. Dist.* v. *Department of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998) ("We have recently expressed our general doubts about the canon that 'remedial statutes are to be construed liberally,' since virtually any statute is remedial in some respect."); *Bushendorf* v. *Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993) ("It will not do to intone the hoary canon that remedial statutes are to be construed liberally. This is one of the least persuasive of the canons; * * * we [have] called it 'useless.'").

Br. 27; see also Harkin Br. 7 ("The proper approach * * * is to broadly interpret the definition of disability, so that a fact-specific inquiry into the individual's qualifications can be pursued.").

By giving primacy to the pursuit of a "fact-specific inquiry into the individual's qualifications," however, petitioners and *amici* put the cart before the horse. As this Court observed when it construed the Rehabilitation Act in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), "only those individuals who are both handicapped *and* otherwise qualified are eligible for relief." *Id.* at 284 (emphasis in original). An individual must first make the threshold showing ***that he is disabled*** before he can complain that he was rejected for a job based on physical shortcomings despite his ability to perform the job's "essential functions." As discussed above, the Act purports neither to do away with employers' freedom to impose physical qualifications (even unsubstantiated ones) on potential employees, nor to give all employees the opportunity to litigate over whether they are actually qualified for positions whose physical standards they do not meet. ***Only the disabled*** have that right under the ADA. A policy argument that everyone should have that right is no help in construing the statute that Congress actually passed and the President signed.

Petitioners also contend that considering mitigating measures when determining whether an individual is disabled will deny protection to individuals with serious impairments who manage to control their disabilities sufficiently to perform the essential functions of the jobs they have or seek. Affirmance of the decision below, petitioners and their *amici* dramatically predict, would create a "Catch-22" whereby no qualified individual would be considered disabled, and no disabled individual would be qualified. Harkin Br. 7-9; ACLU Br. 18.

The supposed "Catch-22" is wholly illusory, however. Many people whose controlled impairments allow them to work nonetheless continue to be "substantially limited" in major life activities. As Senator Harkin *et al.* explain helpfully in their brief (at 9-13), many people who suffer from diabetes, epilepsy, and mental illness often remain quite limited at work or otherwise, even with treatment. See also AIDS Action Br. 22 ("[m]any individuals who rely on mitigating measures continue to experience limitations, albeit lessened, that require accommodations"). Contrary to the concerns expressed by these *amici*, such individuals will continue

to be covered under the Act.[18] Those who (like petitioners) completely control their "impairments" with non-burdensome corrective measures, however, will not be considered disabled under the first prong of the disability definition. If their employers discriminate against them because of a misunderstanding of their condition or a fear that it will recur, they will be protected under the second or third prong of the disability definition. All of the goals of the ADA can thus be served without broadening the definition of actual disability to sweep in perfectly able-bodied people like petitioners, whom Congress did not intend to protect.[19]

Petitioners argue that the consideration of mitigating measures would "require courts to dictate what treatments, medications, or other measures each disabled person must undergo." Pet. Br. 27. They raise the specter of judges deciding "whether an impaired person should accept medication with significant side effects, seek out experimental treatments, undergo evasive surgery, and so forth." *Id.* at 30. But, just as the statute's language indicates that the inquiry is actual ("substantially limits") and not hypothetical ("would substantially limit"), so too the language is naturally read to make the disability analysis descriptive, not prescriptive; the court should consider only corrective measures that the individual actually uses when evaluating the impact of the impairment. See *Haworth* v. *Procter & Gamble Mfg. Co.*, 1998 WL 231062 (D. Kan. Apr. 30, 1998) (declining to take into account effects of medications plaintiff does not take regularly for financial/insurance coverage reasons); but see *Testerman*, 1997 U.S. Dist. LEXIS 21392, at *48-*49 (ruling that defendant had raised a genuine dispute as to whether

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[18] Contrary to the views of petitioners' *amici*, statements in the legislative record recognizing that people with chronic conditions like HIV or epilepsy may need workplace accommodations to facilitate their medical treatment ***support*** consideration of the effects (and the demands) of corrective measures when determining whether someone is disabled. See, *e.g.*, AIDS Action Br. 10-11. The medical treatment of a condition obviously does not cause it automatically to lose its status as a disability. For example, this Court had no difficulty deciding in *Bragdon*, 118 S. Ct. at 2206, that the plaintiff was substantially limited in reproduction whether or not the effects of medication were considered.

[19] As we discuss in Part III, *infra*, a person with a controlled impairment will not ***necessarily*** be "regarded as" disabled by an employer that deems him or her physically unsuited for a particular job.

the plaintiff's diabetes would have been substantially limiting if it had been more diligently treated). In any event, like every element of petitioners' parade of horribles, this issue has nothing to do with this case: there is no controversy concerning the actions that petitioners have taken to correct their impairment.

The Government attempts another version of this argument, contending that the consideration of mitigating measures "would lead to a strange instability in the definition of disabilities." 97-1992 Gov't Br. 15. Noting that "many forms of medication and other mitigating measures vary in their effectiveness over time," the Government contends that, by contrast, "determining whether an impairment [without reference to mitigating measures] substantially limits a major life activity is relatively straightforward." *Id.* at 15-16. But there is no basis at all for the government's speculation that the effectiveness of mitigating measures is ***more*** variable over time than is the degree of limitation imposed by impairments themselves. Certainly, when the "impairment" at issue is nearsightedness, common experience as well as government statistics suggest that ***uncorrected*** vision is more likely to change (and change radically) as people age than is the effectiveness of common corrective measures, which can bring the vast majority of the populace to 20/20 corrected vision over most of their lives. Any remaining "instability" is inherent in the case-by-case analysis of the effect of a given impairment on each individual required by the statute. See *Deas* v. *Alternative Addiction Treatment Concepts, Inc.*, 152 F.2d 471 (5th Cir. 1998), petitions for cert. pending, Nos. 98-916, 98-1057. Indeed, the ***failure*** to consider mitigating measures would lead to a strange ***stasis*** in the definition of disabilities, by replacing the evaluation of an impairment's actual effects with the assessment of presumptions about the impairment's possible effects in its untreated state.

Petitioners and their *amici* also claim that the Tenth Circuit's rule will create perverse incentives by "rewarding" people who do not ameliorate their impairments with the right to sue under the ADA. But few people would abandon effective remedies for their impairments merely to obtain rights under the ADA; and any inclination to do so would be checked by the obligation to remain qualified for the job they seek.[20] Petitioners' hypothetical suggestion that

[20] Contrary to the suggestion of petitioners (Br. 29) and the First Circuit in *Arnold*, 136 F.3d at 863 n.7, it is not at all odd that the statute may give less protection to people who take care of themselves than to those who forgo mitigating measures. People are disabled for many reasons, but this statute is not constructed to protect only the most deserving of them. The person who is in a wheelchair because he foolishly jumped out of a window during a college prank is no less entitled to statutory protection as "disabled" than the person who has been unable to walk since birth. The statute's focus, undeniably, is on the individual's condition, ***not*** how the individual came to be in that condition. Similarly, ongoing medical regimens (such as diet and exercise) to treat various conditions may exceed particular individuals' self-discipline. When the consequences of failure to follow "doctor's orders" become severe enough, some individuals, as a result of their own decisions, may be substantially limited in a major life activity while their more self-disciplined friends are not. But the statute humanely affords protection to ***all*** disabled persons including those who have forgone appropriate treatment. The absurdity of reading the unqualified phrase "substantially limits" to require inquiry into an individual's hypothetical activities is far greater than the supposed "absurd results" (Pet. Br. 29) inherent in the possibility that under respondent's non-hypothetical reading a few litigious individuals might forgo treatment and suffer limitation in major life activities just so that they could obtain favorable legal treatment. And judges may well have the tools available to deal with truly abusive litigation-driven tactics. See *Bowers* v. *Multimedia Cablevision, Inc.*, 1998 U.S. Dist LEXIS 19319, at *11 (D. Kan. Nov. 3, 1998) ("the plaintiff cannot gain ADA protection by unilaterally deciding, without justification, not to use prescribed medication which corrects or alleviates his condition").

they would be proper plaintiffs if they threw away their glasses illustrates this. Petitioners are unlikely to give up watching television, driving, and reading to support their right to sue United, and in any event they would have no chance of establishing that they are qualified to fly passenger jets without their glasses.

Petitioners also claim that the Tenth Circuit's reading of the disability definition conflicts with the employer's obligation to provide reasonable accommodations to persons who are substantially limited in the major life activity of working. Under the court of appeals' reasoning, they contend, an employer would be entitled to withdraw the required accommodation as soon as it was provided, because the impairment would "no longer 'affect[ ] the individual in fact.'" Pet. Br. 33. There is no danger, however, that any court would adopt the absurd and circular rule that the provision of the ADA's remedy simultaneously removes the statute's protections.

The Tenth Circuit's rule does not suffer from such circularity. Petitioners are not disabled, not because they have received from an employer an accommodation without which they would be unable to perform a wide variety of jobs, but because they suffer from no functional impairment and could perform almost any job for which they were trained without accommodation.[21]

Petitioners also argue that the Tenth Circuit's reasoning is at odds with the second prong of the disability definition, which covers individuals with a "record of" being disabled. Pet. Br. 33-34. Petitioners contend that a formerly disabled but completely cured person is protected under the second prong, but that a person with an ongoing but controlled impairment would not be covered by the Act at all. *Ibid.* Every statute that draws a line around a protected class will cause some anomalies, but this is not one. The second prong of the disability definition aims at protecting individuals who were formerly disabled or inaccurately identified as disabled from discrimination based on the inaccurate belief that they are still disabled or the fear that the condition will recur. See 29 C.F.R. § 1630.2(k). It does not protect formerly disabled people from the sort of physical qualifications to which non-disabled people are subject. Thus, if a formerly blind person had his vision restored, but was still severely nearsighted, he would have no more right to challenge United's vision standard than petitioners do, because United's action would be based on his current, non-disabling vision impairment, not his former blindness.[22] In any event, ***petitioners*** would not be covered under the second prong even if their

[21] Nor is it true, as petitioners contend (Pet. Br. 33), that "the fact that an employee can perform a job only with a reasonable accommodation is itself a substantial limitation." Once again, petitioners disregard the fact that the threshold disability determination decides ***who*** is entitled to demand a reasonable accommodation from employers. The fact that an employee would need an accommodation to perform a ***particular*** job does not establish that he or she is substantially limited in the major life activity of working — just as an individual's use of corrective measures does not alone establish disability.

[22] Such a person might have a cause of action against United if, for example, United refused to hire him because of an unfounded fear that he would lose his vision again.

impairment were completely eliminated by laser surgery. The cure of an impairment that was never a disability does not make it one.[23]

B. The Legislative History Does Not Justify An Expansion Of The ADA To Require Disregard For Corrective Measures

Petitioners argue that they can discern from a few brief statements in committee reports that Congress intended to preclude consideration of any mitigating measures when determining whether an individual is covered by the Act. It is inappropriate, of course, to resort to the legislative history to divine the meaning of a statute when the statute itself is clear. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Even when a statute is ambiguous, moreover, the legislative history is of little value in clarifying congressional intent if it expresses inconsistent positions regarding the question at hand. With regard to the narrow question of mitigating measures, "[t]he legislative history [of the ADA] is more conflicting than the text is ambiguous." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49 (1950). Moreover, the legislative history (reinforcing the broad statements of purpose in the statute itself) makes it plain that Congress did not intend to protect under the ADA people like petitioners who have widely shared and easily remedied impairments. Accordingly, the legislative history may not

[23] The Government's argument from the structure of the ADA is more nuanced, but equally flawed. The Government contends that mitigating measures must be treated as parallel to reasonable accommodations, which come into play only after the disability determination has been made. See 97-1992 Gov't Br. 13. But it proves its own argument wrong when it observes (*ibid.*) that "[m]itigating measures taken by an employee will often require some accommodation by an employer." As this demonstrates, the effects of mitigating measures (both beneficial and limiting) are "inextricably intertwined," not with accommodations as the Government suggests, but with the impairment that (together with the mitigating measure) either does or does not constitute a disability that must be accommodated.

The Government says it is concerned about employers denying non-disabled employees the right to take medication. *Id.* at 14. But anyone whose medication schedule was so demanding that it could not be accomplished during normal breaks would no doubt be deemed to have a substantially limiting impairment, and hence remain entitled to the necessary accommodation.

fairly be used as a basis for extending the ADA to cover the more than 100 million Americans with correctable nearsightedness.

Petitioners claim that statements in three committee reports clearly convey Congress's intent that the existence of a disability be analyzed without mitigating measures (Pet. Br. 22), but those sources are far more ambiguous than petitioners suggest. Petitioners claim (*ibid.*) that a statement in the August 1989 report of the Senate Committee on Labor and Human Resources unambiguously supports their position, but it does the opposite. The report states that, under the first prong of the disability definition, "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, ***such as reasonable accommodations or auxiliary aids***." S. Rep. No. 101-116, 101st Cong., 1st Sess., at 23 (emphasis added). The statute itself makes plain that "reasonable accommodations" and "auxiliary aids" are devices or job modifications ***provided by the employer*** to permit a disabled individual to perform the essential functions of a job. 42 U.S.C. §§ 12102(1), 12111(9). Thus, the report's statement reflects the intention to avoid the circularity that petitioners and their *amici* apparently fear — *i.e.*, that the provision of an accommodation to an employee would simultaneously deprive the employee of the ADA protection by removing his or her substantial limitation in working. The statement does not convey any intention to protect under the ADA those ***who do not need accommodations or auxiliary aids*** because their impairments are completely controlled with medication or other corrective measures.

Another passage in the same report plainly conveys that the effects of medication or other corrective devices have a bearing on the question of disability. In describing the purpose of the "regarded as" prong of the disability definition, the Senate Report states:

> Another important goal of the [regarded as] prong of the definition is to ensure that persons with medical conditions ***that are under control, and that therefore do not currently limit major life activities,*** are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S. Rep. No. 101-116, at 24 (emphasis added). It could not be more clear that the drafter believed that persons "with medical conditions that are under control, and that therefore do not currently limit major life activities," would not be deemed to have a disability under the first prong of the definition.

Even the statements in the committee reports that do bolster petitioners' view that mitigating measures should be disregarded do not unambiguously support the application of such a rule to their own case. Those reports use as examples of "mitigated" impairments epilepsy or diabetes controlled with medication and hearing loss controlled with a hearing aid (H.R. Rep. No. 101-485(II), at 52; H.R. Rep. No. 101-485 (III), at 28-29) — impairments that are far more serious than petitioners' correctable nearsightedness.[24]

Finally, the legislative history is replete with evidence that Congress believed it was passing a statute that would protect the large, but limited, population of individuals with actual functional deficits, as opposed to those with purely hypothetical limitations. See, *e.g.*, H.R. Rep. No. 101-485(II), at 41-47 (describing effects of discrimination against the disabled). That evidence is perhaps strongest in the case of visual impairments; as discussed above (at 20-21), congressional estimates of the number of disabled individuals in America included only those who had a significant vision deficits even when using corrective lenses. Statements in committee reports to the effect that "two-thirds of all disabled Americans between the age of 16 and 64 are not working at all," that "men with disabilities earned 23 percent less than men with no work disability," and that "forty percent of all adults with disabilities did not finish high school" (H. Rep. No. 101-485(II), at 32) also contradict any notion that Congress intended to protect nearsighted persons, who have higher than average income and education.

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[24] Notwithstanding petitioners' comparison of their own situation to that of a person with hearing loss (Pet. Br. 22-23), in common perception hearing impairments requiring the use of a hearing aid are far more serious than the more common and easily remedied nearsightedness or farsightedness. See *Washington* v. *HCA Health Servs.*, 152 F.3d at 470 (expressing doubt concerning whether correctable visions impairments are sufficiently similar to the "serious" impairments, such as hearing impairments, enumerated in EEOC guidance to be evaluated without regard to mitigating measures). In any event, we doubt that the committee reports are sufficiently powerful legislative history to require application of the ADA to a person who wears a hearing aid but who with that aid is ***not*** substantially limited in any actual major life activity and not even "regarded as" being so limited.

More important, as discussed above, the statutory findings themselves — which, unlike the committee reports, were likely considered by every legislator and the President — convey the congressional purpose to protect those with serious impairments who were faced with discrimination, isolation, and underemployment, not people who can function perfectly well merely by taking a few pills or putting on their glasses. As Justice Scalia has observed,

> it is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis * * * in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

Blanchard v. *Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment); see also *City of Chicago* v. *EDF*, 511 U.S. 328, 337 (1994). That observation is especially pertinent to a case such as this, in which petitioners propose, based on "a few snippets" of analysis unmoored in statutory language, to expand the ADA to include perhaps more than 100 million additional potential plaintiffs.[25]

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[25] Petitioners also contend that Congress ratified in the ADA a consistent judicial construction of the Rehabilitation Act's definition of "handicap" that disregarded corrective measures. That argument has many flaws. First, the weight of pre-ADA case law supported consideration of mitigating measures. See, *e.g.*, *Reynolds* v. *Brock*, 815 F.2d 571 (9th Cir. 1987) (plaintiff's controlled epilepsy substantially limited her ability to work). See generally 97-1992 Resp. Br. Second, even if petitioners' reading of the pre-ADA cases were correct, it would not be reasonable to infer from Congress's adoption of the Rehabilitation Act's definition of disability that it was aware of this nuance of interpretation. See *Hirschey* v. *FERC*, 777 F.2d 1, 8 (D.C. Cir. 1985) (Scalia, J., concurring) (rejecting notion that committee report reflected intent of Congress to resolve "a difficult question of interpretation that had produced a conflict in the circuits and internal disagreement within three of the five courts that had considered it [by] reenactment of the same language unchanged!") (emphasis omitted). Third, even the most diligent legislator inquiring into the Rehabilitation Act's treatment of nearsightedness would have been surprised to hear that it supposedly supported coverage for more than 100 million nearsighted Americans. No Rehabilitation Act case had ***ever*** protected a nearsighted person on this theory, and some cases had reached a contrary result (*e.g.*, *Padilla* v. *City of Topeka*, 708 P.2d at 550).

C. At The Very Least, The ADA Should Be Read To Exclude Individuals With Widely Shared And Easily Correctable Impairments

Even if the Court defers to the EEOC's views that the disability analysis should disregard mitigating measures, it should affirm the Tenth Circuit's ruling that petitioners are not disabled. As Judge Wilkinson observed for the Fourth Circuit concerning the Rehabilitation Act, "it would debase [the] high purpose [of the statute] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared." *Forrisi* v. *Bowen*, 794 F.2d 931, 934 (1986); see also *Shiflett* v. *GE Fanuc Automation Corp.*, 960 F. Supp. 1022, 1029 (W.D. Va. 1997) ("Those who insist that any common human flaw rises to the level of disability, to the extent they are successful, dilute the strength of the ADA and rob truly disabled individuals of ADA protection."), aff'd, 151 F.3d 1030 (4th Cir. 1998). To avoid expanding the ADA well beyond its intended bounds, the Court should rule that common impairments that are completely correctable by easily used mitigating measures are not disabilities.

Petitioners and their *amici* spend little time discussing the facts of this case, as we noted above. They pin their hopes on the argument that there is no principled way to distinguish their case from those of others with correctable impairments who appear far more worthy of inclusion. Pet. Br. 36-38; Gov't Br. 10. But that is decidedly weak justification for throwing open the floodgates and permitting more than 100 million people whom Congress obviously meant to exclude to claim coverage under the Act. To give primacy to the achievement of some formulaic consistency (which notably is ***not*** rooted in the text of the statute) is particularly misguided in the context of a statute that presumes a case-by-case determination of what constitutes substantial limitation.

As we have argued, neither the text nor the legislative history of the Act provides an inkling that it covers people with correctable nearsightedness and others who experience no disadvantages from their easily mitigated impairments. The purposes of the statute, moreover, are not served by providing such persons a right of

action to challenge the physical qualification standards or other actions of their employers. Even the EEOC guidance on which petitioners and their *amici* principally rely does not expressly bless the inclusion of such persons under the Act. As the Fifth Circuit recognized in *Washington* v. *HCA Health Services*, the EEOC guidelines require only that "serious impairments and ailments" such as diabetes, epilepsy, and hearing impairments be considered in their unmitigated state. 152 F.3d at 470.

Even when mitigating measures are considered, the protected class of those who are "substantially limited" by their impairments properly includes those whose control of their significant impairment is meaningfully incomplete or requires resort to corrective measures that themselves have debilitating effects or impose non-trivial restrictions. See *Cehrs*, 155 F.3d at 781. "[W]hat is necessary to 'control' the condition may be part of what makes the person disabled." *Gilday*, 124 F.3d at 768 (Guy, J., concurring in part and dissenting in part). If, however, the Court is concerned that describing the group to be ***included*** within the protected class with reference to mitigating measures will result in unduly restrictive rulings, it may instead draw a line around those who should be ***excluded*** from the class — people whose easily correctable impairments consistently and reliably leave them with abilities on a par with average working people, and for whom the corrective measures themselves impose no significant burden. Petitioners are inside that line.

III. AN INDIVIDUAL REJECTED FROM A PARTICULAR JOB FOR FAILURE TO MEET PHYSICAL STANDARDS IS NOT NECESSARILY "REGARDED AS DISABLED" BY THE EMPLOYER

Petitioners also claim that they are entitled to relief under the third prong of the ADA's disability definition, which extends statutory protections to person who are "regarded as" having a disabling impairment. Although petitioners and their *amici* repeatedly invoke Congress's concern about the "myths, fears, and stereotypes associated with disabilities" (see, *e.g.*, Harkin Br. 21), their argument boils down to the contention that an employer by definition regards an employee as disabled whenever it deems the employee physically unfit for a particular job.[26] If that reading of

[26] Certain of petitioners' *amici* argue expressly for that interpretation.

the "regarded as" prong were correct, however, then ***any*** employment action made on the basis of ***any*** impairment, no matter how minor, would have to pass muster under the ADA — a result that would expand the ADA well beyond its intended limits. This Court should approve the uniform rulings of the lower courts rejecting such an overbroad reading of the statute.

The ADA's definition of disability includes not only having an "impairment that substantially limits one or more of the major life activities" (42 U.S.C. § 12101(2)(A)), but also "being regarded as having such an impairment" (*id.* § 12101(2)(C)). The third prong's phrase "such an impairment" incorporates the first prong's language. Accordingly, to qualify as "disabled" under the third prong, an individual must be "regarded as having an impairment that substantially limits a major life activity."

Petitioners claim that United regarded them as substantially limited in the major life activity of working.[27] The EEOC's regulations define "significantly restricted in the major life activity of working" as:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). According to the regulations, a "class" of jobs is "jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area." *Id.* § 1630.2(j)(3)(ii)(B). Using an example especially pertinent here, the EEOC's interpretive guidance states that "an individual who cannot be a

See ACLU Br. 21 ("any employer who takes an adverse employment action against a person *because of* a physical or mental impairment necessarily regards that person as substantially limited in the life activity of working and hence as a person with a disability").

[27] Because petitioners here focus only on the allegation that United regarded them as substantially limited in working (Pet. Br. 42 n.38), we address only that allegation. For the same reasons that petitioners are not actually limited in the major life activity of seeing, however, United did not regard them as such.

commercial airline pilot because of a minor vision deficiency, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. § 1630, App. § 1630.2(j) para. 15.

"For the same reason that the failure to qualify for a single job does not constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped person." *Tudyman* v. *United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984). Thus, when an employer decides that a person's impairment renders him unfit for a job with unusual physical requirements, the disappointed employee cannot claim that the employer regarded him as disabled in the major life activity of working. See, *e.g.*, *Deas*, 152 F.3d at 481-482 (plaintiff was not "regarded as" disabled by employer who fired her from a substance abuse clinic because of her seizure disorder; "there is simply no indication that [the employer] regarded [plaintiff] as substantially limited as to anything more than a few, highly specialized jobs, that required relatively high levels of vigilance or uninterrupted awareness"); *Bridges* v. *City of Bossier*, 92 F.3d 329, 335 (5th Cir. 1996) (plaintiff rejected because of mild hemophilia from firefighter job was not "regarded as disabled" because the perceived limitation "only affects a narrow range of job"), cert. denied, 519 U.S. 1093 (1997); *Chandler*, 2 F.3d at 1392 & n.20 (vision impairment that caused the plaintiff's rejection as a police officer affected only a narrow range of jobs, even though the defendant alone employed 27,000 police officers). By contrast, when an employer views the employee as having an impairment that would limit him or her in a broad range of jobs, there may be a litigable issue as to whether the employer regards the employee as disabled. See *Cook* v. *Rhode Island*, 10 F.3d 17, 26 (1st Cir. 1993) (employer's belief that obese woman was physically unsuited for job which required "no unique physical skills" amounted to "a perception that the applicant suffers from physical limitations that would keep her from qualifying for a broad category of jobs").

Thus, "there is a significant legal distinction between rejection based on a job-specific perception that the applicant is unable to ***excel*** at a narrow trade and a rejection based on more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs." *Cook*, 10 F.3d at 26 (emphasis added). United's rejection of petitioners falls into the former category. Petitioners and their supporting *amici* seek to raise doubt

about the proper characterization of United's beliefs concerning their impairment, but even the broadest conceivable characterization of United's perceptions does not amount to a belief that petitioners were substantially limited in the major life activity of working.

In their complaint, petitioners claimed that United's policy requiring new pilots to have uncorrected visual acuity of 20/100 "blocks Plaintiffs from an entire class of employment: ***global airline pilot***." J.A. 25 (emphasis added). They also alleged that "other global carriers had similar or higher minimum standards, thus blocking Plaintiffs from seeking ***the same class of employment*** elsewhere in the industry." J.A. 26 (emphasis added). The court of appeals held those allegations insufficient to establish that United regarded petitioners as disabled, ruling that the path that they said was closed to them, "global airline pilots," was "too narrow to constitute a 'class of jobs.'" J.A. 71. The court said (J.A. 71-72):

> [T]he class of jobs to which [petitioners] must compare themselves is that of all pilot positions at all airlines, because they all require the same or similar training, knowledge, skills, or training abilities. This class would include, but not be limited to, all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines.[28]

Petitioners now seek to rewrite their complaint by arguing that United perceived them as unfit for ***any*** pilot job. The Government joins them in that effort, claiming (without citing any language in the complaint) that "[p]etitioners allege that respondent regards petitioners as unqualified for any pilot position, because respondent believes they cannot safely fly an airplane." Gov't Br. 16. These arguments raise an interesting philosophical question: Does United's decision to adopt higher vision standards than the FAA or many non-global carriers in an effort to make its planes "safer than safe" mean that United "believes [petitioners] cannot safely fly [any] airplane"? More important, does United's alleged decision to

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[28] The court of appeals was generous to petitioners in assuming that only pilot positions bore on the "regarded as" issue. One who cannot be a pilot because of, for example, fear of flying is not limited in the major life activity of working, or regarded as such. He is regarded as unqualified, which is quite different from being regarded as disabled. See p. 49, *infra*.

take advantage of the fierce competition for its pilot positions by demanding that its pilot applicants meet the highest physical standards mean that it regards applicants whom it rejects (who it knows are capable of obtaining employment at other air carriers) as substantially limited in the major life activity of working? We think not. In the words of the *Cook* court, United seeks (and pays for) pilots who "excel" on this safety-related criterion as well as in other respects.

The major leagues' last .400 hitter, Ted Williams, was famous for his 20/10 eyesight. See *In Every Sense, Williams Saw More Than Most*, USA Today Baseball Weekly, June 6, 1996 <http://www.usatoday.com/sports/baseball/sbbw0725.htm>. Were the Boston Red Sox to take their left fielder with 20/20 vision out of the lineup and replace him with a prospect who had 20/10 vision and aspirations of being a modern-day Ted Williams, it would hardly follow that the Bosox regarded the replaced left fielder as "disabled." Just as a baseball team tries to field the ***best*** lineup and not just a good lineup, so United may sometimes go beyond minimum requirements in an effort to provide the public with ***the safest*** air transportation, not just "safe" air transportation. The judgments about how to achieve those results may not be ineluctable or perfect, and someone can always second-guess any categorical judgment, but that is no reason to expand the reach of a statute designed to require employers to justify their judgments ***about persons with disabilities***. Attempting to go beyond minimum safety requirements should not preclude United from obtaining Rule 12(b)(6) dismissals of complaints brought by persons who are not disabled.[29]

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[29] That is especially so in light of a recent trend in this Court's cases allowing state common law to impose higher standards of care on defendants in tort suits, even if the defendant can prove compliance with a federal statute with an express preemption clause. See generally *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). Were a United plane with a myopic pilot to crash, one could count on the filing of lawsuits against United on the theory that it had a duty of care to hire only pilots with vision better than that of the pilot of the crashed plane, and that it makes no difference that the Federal Aviation Administration has recently begun to allow anyone with 20/20 ***corrected*** vision to be a pilot. Cf. *Daugherty* v. *City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) ("'Woe unto the employer who put such an employee behind the wheel of a vehicle * * * which was involved in a vehicular accident.'") (quoting *Chandler*, 2 F.3d at 1395).

Even if an employment rule screens out only a small segment of the population, it does not follow that the rule reflects, or even might reflect, any view on the employer's part that the screened-out persons are "disabled." A supermarket that will not hire as shelf stockers anyone shorter than five feet tall in no way implies that it considers short people "disabled." So too here, United makes some allowance for the common condition of nearsightedness but screens out a substantial minority of the most myopic. Had United followed the Navy's example and required near-perfect uncorrected vision, it would be hard to take seriously the notion that its stringent rule reflected a view that everyone not meeting that standard is "disabled." It would be ironic if United's decision to make some allowances for nearsighted pilots bolstered the chances of a lawsuit brought by those who cannot meet even its relatively lenient standard.

The ultimate question here can be answered in a more straightforward fashion, however. Even if petitioners' complaint could be construed as alleging that United perceived petitioners as physically unfit to fly any commercial airplane, those allegations would not establish that United regarded them as substantially limited in the major life activity of working because the position of "pilot" is far too specific to constitute a "class of jobs" the foreclosure from which would render an individual disabled. See *Witter* v. *Delta Air Lines*, 138 F.3d 1366, 1370 (11th Cir. 1998) ("[e]ven accepting as true that Delta perceived Witter as unable to pilot airplanes because of mental or emotional problems, we conclude that piloting airplanes is too narrow a range of jobs to constitute a 'class of jobs'"). There are many non-piloting jobs that use "similar training, knowledge, skills and abilities" as pilot positions, including

> pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.

Ibid.; see also *Burbank* v. *City of Idaho Falls*, 1996 U.S. App. LEXIS 24127 (9th Cir. Sept. 11, 1996) (defendant who viewed plaintiff with impaired vision as unfit for the positions of patrol police officer, professional pilot, and lab technician did not regard him as disabled). There is no allegation that petitioners would be physically unqualified for such jobs, or that United treated them as though it believed they would be.

Thus, the court of appeals' dismissal of petitioners' claim that United discriminated against them because it regarded them as disabled was proper under the widely accepted rules and doctrines by which courts have consistently evaluated such claims. It also accords with the intent of Congress to protect under the third prong of the definition those persons with impairments who might be denied the opportunity to work because of fear, prejudice, and misunderstanding of their condition. See *Arline*, 480 U.S. at 284 (by enacting third clause of disability definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that can flow from actual impairment"). There can be no serious argument that petitioners were subject to fear or prejudice because of their nearsightedness; they were affected instead by United's calculation that hiring pilots who could see well enough to fly an airplane without corrective lenses would give its passengers an additional margin of safety. The ADA does not give petitioners the right to litigate the correctness of United's decision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
Brownstein Hyatt
Farber & Strickland, P.C.
Twenty-second Floor
410 Seventeenth St.
Denver, CO 80202
(303) 534-6335

ROY T. ENGLERT, JR.
MIRIAM R. NEMETZ
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondent

MARCH 1999

Supreme Court, U.S.
FILED
APR 9 1999
CLERK

No. 97-1943

In The

Supreme Court of the United States

October Term, 1998

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS

VAN AARON HUGHES
Counsel of Record
for Petitioners
TUCKER K. TRAUTMAN
KRISTIN L. WETENKAMP
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, CO 80202
Telephone: (303) 464-9409

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2648

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS..... 1

I. PILOTS ARE ACTUALLY DISABLED IN THE MAJOR LIFE ACTIVITY OF SEEING..... 1

A. The Court Should Not Treat Severe Myopia Differently Than Other Correctable Impairments 1

B. The Court Should Analyze Pilots' Impairment In The Uncorrected State 4

1. The Court Should Adhere To The EEOC's Permissible Construction Of The ADA ... 4

2. The Language Of The ADA Supports Consideration Of Disabilities In The Uncorrected State 7

3. United's Assertion That Congress Intended To Exclude Severe Myopia Is Contrary To The Relevant Legislative History And Statutory Purposes 11

II. UNITED REGARDED PILOTS AS DISABLED IN THE MAJOR LIFE ACTIVITY OF WORKING... 14

A. Pilots Have Adequately Alleged That United Falsely Perceived Them To Be Unfit..... 14

B. The Tenth Circuit Correctly Defined The Relevant Class Of Jobs 17

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 6

Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998) 8, 13, 19

Burbank v. City of Idaho Falls, 1996 WL 518098 (9th Cir. Sept. 11, 1996) 19

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4, 5, 7

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 5

Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2d Cir. 1998), *cert. denied*, 1999 WL 25239 (Mar. 22, 1999) 3

Cook v. State of R.I., Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17 (1st Cir. 1993) 15

Denson v. Village of Bridgeview, 19 F. Supp. 2d 829 (N.D. Ill. 1998) 3

Deane v. Pocono Med. Ctr., 142 F.3d 138 (3d Cir. 1998) 15

Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998) 15

Fallacaro v. Richardson, 965 F. Supp. 87 (D.D.C. 1997) 3

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) 20

Headrick v. Rockwell Int'l Corp., 24 F.3d 1272 (10th Cir. 1994) 5

TABLE OF AUTHORITIES – Continued

Page

Joyce v. Suffolk County, 911 F. Supp. 92 (E.D.N.Y. 1996) 3

Kienast v. Frank, 1990 WL 711359 (EEOC Mar. 27, 1990) 3

Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) 17

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) 12, 17

McKay v. Toyota Motor Mfg., U.S.A., 110 F.3d 369 (6th Cir. 1997) 19

Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998) 18

Mustafa v. Clark County Sch. Dist., 157 F.3d 1169 (9th Cir. 1998) 19

Natural Resources Defense Council v. EPA, 824 F.2d 1258 (1st Cir. 1987) 6

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) 16

Padilla v. City of Topeka, 708 P.2d 543 (Kan. 1985) 13

Peacock v. County of Marin, 953 F. Supp. 306 (N.D. Cal. 1997) 3

Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983) 6

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 12

Rizzo v. Childrens World Learning Ctrs., 84 F.3d 758 (5th Cir. 1996) 17

School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987) 8

TABLE OF AUTHORITIES – Continued

Page

Sicard v. City of Sioux City, 950 F. Supp. 1420 (N.D. Iowa 1996) 4

Taylor v. Phoenixville Sch. Dist., 1999 WL 184138 (3d Cir. April 5, 1999) 3

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 6

Trembczsynski v. City of Calumet City, 1987 WL 16604 (N.D. Ill. Aug. 31, 1987) 12

United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365 (1988) 9

Webb v. Garelick Mfg. Co., 94 F.3d 484 (8th Cir. 1996) 18

Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898 (E.D. Pa. 1997) 3

Witter v. Delta Air Lines, 138 F.3d 1366 (11th Cir. 1998) 18

Wyland v. Boddie-Noell Enters., Inc., 1998 WL 795173 (4th Cir. Nov. 17, 1998) 3

STATUTES AND RULES

29 C.F.R. § 1630.2(j) (1998) 3, 6, 9, 19

29 C.F.R. pt. 1630, App. § 1630.2 (1998) ..... *passim*

42 U.S.C. § 12101(a) (1994) 10, 11, 13

42 U.S.C. § 12112(b)(6) (1994) 16

42 U.S.C. § 12113 (1994) 16

Fed. R. Civ. P. 12(b)(6) 14, 17

TABLE OF AUTHORITIES – Continued

Page

54 Fed. Reg. 16042 (1989) 5

55 Fed. Reg. 31192 (1990) 5

56 Fed. Reg. 8578 (1991) 5

56 Fed. Reg. 35726 (1991) 6

MISCELLANEOUS

H.R. Rep. No. 101-485(II), *reprinted in* 1990 U.S.C.C.A.N. 303 ..... 1, 12, 13

David J. Lee, et al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 Ophthalmology 552 (1998) 10

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TABLE OF AUTHORITIES – Continued

Page

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United Air Lines, Flight Officer Positions, <http://www.ual.com/airline/our_company/officer.asp> 19

REPLY BRIEF FOR PETITIONERS

I. PILOTS ARE ACTUALLY DISABLED IN THE MAJOR LIFE ACTIVITY OF SEEING.

A. The Court Should Not Treat Severe Myopia Differently Than Other Correctable Impairments.

The primary thrust of United's argument is that, even if other impairments are considered in their uncorrected state, myopia should be treated differently. United's distinction proceeds from little more than its intuitive sense that severe myopia is somehow less serious than other correctable impairments. For instance, United contrasts Pilots' impairment with the House Labor Report's example of a hearing impairment corrected with a hearing aid by baldly asserting that "in common perception" a correctable hearing impairment is "far more serious" than a correctable vision impairment. Resp. Br. 41 n.24. Even if the Court is familiar with such a "common perception," it should not substitute a rule of intuition for the EEOC's coherent guidance – consistent with the language, structure, purpose, and legislative history of the ADA – that *all* impairments must be considered in their uncorrected state in determining whether they substantially limit a person's major life activities.

United insists that Congress could not have intended the ADA to apply to some 100 million Americans who wear corrective lenses. This assertion, even if true,[1] does not address the issue before this Court. The majority rule against consideration of corrective measures does not suggest that the use of a corrective measure is itself a disability, nor have Pilots ever contended that they are disabled merely because they use corrective lenses. *See* Pet. Br. 38. Pilots simply disagree with United's assertion that the existence of an

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[1] United concedes that it is one of only a handful of employers to discriminate on the basis of uncorrected vision. Resp. Br. 11-12. Thus, even if the ADA applied in all such instances, the Act's effect would hardly be "severely diluted." *Id.* at 9.

effective corrective measure necessarily *precludes* a finding that a person is disabled.

While United attempts to lump together all Americans with less than perfect vision,[2] the ADA contemplates a spectrum of physical limitations, ranging through three categories, depending on the severity of the condition: (1) physical characteristics within the "normal" range, which are not impairments at all, *see* 29 C.F.R. pt. 1630, App. § 1630.2(h), ¶ 3 (1998); (2) limitations which qualify as impairments but are not substantially limiting; and (3) disabilities. The severity of Americans' nearsightedness falls along just such a spectrum. *See* Jean Roberts, *Binocular Visual Acuity of Adults, United States, 1960-1962* (National Center for Health Statistics, Series 11, No. 3; Public Health Service publication no. 1000, 1968), at 3 (approximating the percentage of population with vision worse than 20/40, 20/70, 20/100 and 20/200 as 24%, 16%, 6.5%, and 2.4%, respectively).

Thus, a ruling in Pilots' favor would not support the conclusion that the ADA applies to all Americans who wear glasses. Many of those who are only slightly nearsighted fall within the "normal" range, and thus are not impaired at all. United concedes that this is not true as to Pilots' vision.[3] Individuals with moderate myopia are in turn subject to the argument that, even if they are impaired, their impairments do not rise to the level of a disability. A person is not substantially limited if he can see well enough to function without

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[2] It is ironic that, having asked the Court to concern itself strictly with the facts of this case and to ignore the implications its decision will have upon other correctable impairments, Resp. Br. 7, 9, United then considers myopia only in the abstract, equating Pilots' severe myopia with "milder (and more common) uncorrected nearsightedness." *Id.* at 19.

[3] United agrees that the existence of an impairment is determined without regard to corrective measures. Resp. Br. 22 n.12. Even the court below concluded that Pilots are impaired, J.A. 58, and United does not contest that conclusion in its argument to this Court. Resp. Br. at 22 n.12.

corrective lenses, even though he uses corrective lenses in order to see perfectly[4] or to perform more easily a specific task such as reading or driving.[5] *See Taylor v. Phoenixville Sch. Dist.*, 1999 WL 184138, at *9 (3d Cir. April 5, 1999) ("[n]ot every chronic condition is a disability," only those that "substantially limi[t] a major life activity when left untreated"). This argument also does not apply to Pilots; United does not dispute that Pilots are among the small minority of Americans who, for all practical purposes, cannot see without corrective lenses.[6]

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[4] One who can see adequately but not perfectly without corrective lenses is not "significantly restricted" in the condition or manner in which he sees, whereas one who effectively cannot see at all without corrective lenses *is* "significantly restricted." 29 C.F.R. § 1630.2(j)(1)(ii) (1998). Contrary to United's suggestion, Resp. Br. 18, 19 n.9, it is not anomalous that the provisions of the ADA extend to the latter person, even if her corrected vision might be equal to or marginally better than the former person's.

[5] There is little support for United's suggestion, Resp. Br. 19, that under the majority rule anyone who needs glasses to obtain a license to drive is necessarily disabled. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998) (driving is not a major life activity), *cert. denied*, 1999 WL 25239 (Mar. 22, 1999); *Wyland v. Boddie-Noell Enters., Inc.*, 1998 WL 795173, at *2 n.1 (4th Cir. Nov. 17, 1998) (same).

[6] The ADA leaves the boundaries between the unimpaired, impaired, and disabled categories to be defined through case-by-case determination. The lower courts have, perhaps unwittingly, already begun this process. With only one exception, *Joyce v. Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996) (cited at Pet. Br. 11 n.14), the cases United cites as not considering correctable nearsightedness to be a disability, Resp. Br. 7 n.2, did not involve persons with uncorrected vision worse than 20/80. *See also Kienast v. Frank*, 1990 WL 711359 (EEOC Mar. 27, 1990) (impairment so minor that employee did not wear corrective lenses through most of her employment). In contrast, *all* of the decisions that United acknowledges as holding against its position concerned more severe, although still correctable, myopia. *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829 (N.D. Ill. 1998) (20/400); *Fallacaro v. Richardson*, 965 F. Supp. 87 (D.D.C. 1997) (20/600); *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898 (E.D. Pa. 1997) (20/150); *Peacock v. County of Marin*, 953

United argues that Pilots "function identically" to others with less severe myopia also corrected by glasses. Resp. Br. 19.[7] Of course, the same could be said of any number of "widely shared and easily correctable" impairments. Resp. Br. 43-44. By United's reasoning, the ADA could never protect from discrimination a person with severe but controlled hypertension, asthma, depression, hearing loss, diabetes, arthritis, or seizure disorder, because, as United's *amici* point out, in each case tens of millions of Americans use the same easily applied[8] medications or devices to correct milder cases of the same condition. *See* SHRM Br. 5-7. United has failed to identify a meaningful distinction between myopia and other correctable impairments.

B. The Court Should Analyze Pilots' Impairment In The Uncorrected State.

Even the Tenth Circuit did not apply United's proposed rule of intuition, basing its decision instead on the conclusion that courts should *always* consider the effect of corrective measures in determining the existence of a disability. J.A. 63-65. United has failed to offer a coherent defense of this ruling.

1. The Court Should Adhere To The EEOC's Permissible Construction Of The ADA.

United apparently does not dispute that the EEOC's regulations interpreting Title I of the ADA are entitled to full deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It nevertheless

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F. Supp. 306 (N.D. Cal. 1997) (20/800); *Sicard v. City of Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996) (20/200).

[7] United makes no attempt to reconcile this assertion with its own hiring policy, which makes "allowance for the common condition of nearsightedness but screens out a substantial minority of the most myopic." Resp. Br. 49.

[8] United makes no answer to Pilots' challenge to explain why using corrective lenses is any "easier" than putting in a hearing aid or swallowing a pill. Pet. Br. 37.

contends that the Commission's rule against consideration of corrective measures in disability determinations, contained in the Interpretive Guidance issued alongside the regulations, is not.

United's assertion that merely publishing guidance in the Federal Register is not the same as following a formal notice-and-comment procedure under the APA, Resp. Br. 24, is academic. In this case, deference is appropriate because the EEOC *did* follow the proper notice-and-comment procedure. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 313-16 (1979); Pet. Br. 18-20. The Commission simultaneously published and invited comments on all of its proposed regulations, including the appendix containing its Interpretive Guidance.[9] 56 Fed. Reg. 8578 (1991) (Notice of Proposed Rulemaking, advising that Interpretive Guidance "represents the Commission's interpretation of the issues discussed"); *see also* 55 Fed. Reg. 31192 (1990) (Advance Notice of Proposed Rulemaking); *compare Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (agency's discussion of comments it previously received was published after the fact without inviting comments on the new issues discussed, see 54 Fed. Reg. 16042 (1989)).

United also argues that the corrective measures rule cannot receive *Chevron* deference, because it was not contained in the Commission's original notice. Resp. Br. 24-25. This is incorrect. The EEOC in its original notice specified that the existence of an impairment was to be determined without regard to corrective measures. 56 Fed. Reg. 8578, 8592

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[9] Among the many interested parties that submitted comments were several of United's own *amici*. *See* Comment Nos. 91-0191-ADA (EEAC), 91-0462-ADA (Chamber of Commerce), 91-0500-ADA (SHRM), 91-0541-ADA (ATA). EEAC and SHRM both commented on the contents of the Interpretive Guidance, including specifically its construction of the term "substantially limits." Comment Nos. 91-0191-ADA, at 19-20; 91-0500-ADA, at 9.

(1991). The Commission also applied this rule to determinations of whether an impairment is substantially limiting, making it clear that the inability to perform a major life activity without the assistance of corrective devices or medication is itself a substantial limitation. *Id.* at 8593 (giving examples of a person who can walk, but "in a significantly restricted manner, i.e., only with the use of prosthetic devices," and of "a diabetic who . . . can only perform major life activities with the aid of medication," and citing legislative history against consideration of corrective measures in disability determinations). Interested parties had sufficient notice of the corrective measures rule,[10] as evidenced by the fact that the Commission received dozens of comments on this specific issue. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 155 n.302 (1999).

At a minimum, United cannot avoid the substantial deference that this Court affords to an agency's interpretation of its own regulations. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994) ("plainly erroneous" standard); *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 911 (1997) (applying plainly erroneous standard to litigating position). The Commission included the corrective measures rule to further explain Section 1630.2(j) of its regulations, which defines

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[10] The Commission's insertion of an additional phrase in its final rule, generalizing its examples to "make clear" the rule against consideration of corrective measures so that it could not be "misconstrued," 56 Fed. Reg. 35726, 35727-28 (1991), certainly does not invalidate its prior notice. After notice and comment, "[a]n agency can make even substantial changes from the proposed version, as long as the final changes are 'in character with the original scheme' and 'a logical outgrowth of the notice and comment.' " *Natural Resources Defense Council v. EPA*, 824 F.2d 1258, 1283-84 (1st Cir. 1987) (citations omitted); *see also Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540 n.95 (D.C. Cir. 1983). To prohibit agencies from clarifying proposed rules in response to comments would largely defeat the purpose of the notice-and-comment procedure.

"substantially limits" to include those who are "significantly restricted" in the condition or manner in which they perform a major life activity.[11]

Finally, United argues that even if *Chevron* applies, the EEOC's rule is contrary to the conclusion that "emerges" from a careful analysis of the statutory text, structure, and purposes. Resp. Br. 26-27. But under *Chevron*, the proper inquiry is not what is the best interpretation of the statute, but rather whether Congress has "directly spoken to the precise question at issue." 467 U.S. at 842-43. Because Congress did not directly address the precise issue of corrective measures, the Court should apply the Commission's permissible construction of the statute. *Id.* at 843 & n.11.

2. The Language Of The ADA Supports Consideration Of Disabilities In The Uncorrected State.

The Commission's construction of the ADA is permissible. The language and structure of the ADA amply support the rule against consideration of corrective measures.

The EEOC construes "substantially limits a major life activity" as encompassing the inability to accomplish an act without use of a corrective measure.[12] This construction is consistent with those words' ordinary meaning. The need to

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[11] United argues that the corrective measures rule *really* interprets the underlying statute, not the Commission's own regulation, Resp. Br. 25, but this cuts against its own *Chevron* argument. Either the corrective measures rule is part and parcel of the agency's rulemaking on the statutory gaps Congress intended the EEOC (and the Department of Justice, which joined in the corrective measures rule) to fill, in which case *Chevron* applies, or the Commission was correct to label it merely a guideline interpreting the actual regulations.

[12] United insists that this eliminates the import of the word "substantially." Resp. Br. 27-28. That is not true. Under the EEOC's construction, a person with a mild impairment who remains physically able, even without corrective measures, to perform all major life activities is *not* substantially limited.

rely upon a corrective measure is a significant restriction on a person's ability to perform major life activities.

United responds that Pilots' impairment does not affect them in fact, but only hypothetically. According to United, the phrase "substantially limits" restricts the scope of the Act to those, such as paraplegics and the blind, with impairments so severe they cannot be overcome, no matter what ameliorative measures they take. Resp. Br. 27-28.[13] This is squarely at odds with Congress' intent *not* to limit the scope of the ADA only to such traditional disabilities; *see School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 280 n.5 (1987) (statutory definition not limited to "traditional handicaps"). United emphasizes that Congress placed the phrase "substantially limits" in the present tense, but Pilots do not contend that their vision was limited in the past or that their vision will be limited in the future. Pilots' severe myopia today prevents – present tense – them from being able to see without resorting to corrective measures. Of course, this Court has already concluded in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998), that Congress' use of the present tense does not exclude from the definition of "disability" even asymptomatic HIV, the most serious negative effects of which will appear in the future.

Moreover, United cannot avoid the violence their construction would do to the structure of the ADA. For instance, under United's construction of the Act, an impaired person who is substantially limited in the ability to work in a class of jobs, but who can and does work in that class of jobs with a reasonable accommodation, is by definition not disabled, because he is not "substantially limited in *doing* the things

[13] United also invokes the phrase "major life activities of such individual," Resp. Br. 28-29, but this does nothing to support its position. The words "major life activities" are not pertinent, since both parties agree that seeing is a major life activity. As to the requirement that courts analyze the circumstances specific to each individual, it is United which disregards this instruction by asserting that all correctable vision impairments are indistinguishable. Resp. Br. 19.

other people *do*." Resp. Br. 29 (emphasis in original). United argues that no court would reach such an absurd result, Resp. Br. 37-38, *but that is exactly the point*. United's construction of the Act, if applied faithfully, would *not* "produc[e] a substantive effect that is compatible with the rest of the law," *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (quoted by United).

Similarly, the statutory definition of "disabled" protects from discrimination not only those who are actually disabled, but also those who have a "record" of a disability, even though it has been permanently corrected. Nothing in the structure of the Act suggests that Congress wished to include persons whose impairments are permanently corrected, while subjecting to discrimination persons whose impairments are not cured but only controlled on an ongoing basis.[14] If Congress had indeed intended this surprising result, there were numerous simple ways for it to so specify. *See* Pet. Br. 35.[15]

[14] United ignores Pilots' illustration of the anomalous results this gap would create, Pet. Br. 33-34, and substitutes that of a blind person whose vision is partially restored but remains severely impaired. Because this person remains actually disabled, the "record of" a disability prong never comes into play. Alter United's example slightly, however, and the anomaly reappears: Assume two pilots formerly had very poor, uncorrectable vision. One pilot's vision is permanently corrected by laser surgery, but United refuses to hire her because her eyesight was poor prior to surgery (which, incidentally, Pilots understand is indeed United's policy). In the second pilot's case, technology advances such that the vision impairment becomes correctable with contact lenses. United also refuses to hire this pilot because of her poor uncorrected vision. Under United's construction of the Act, the first pilot is protected against United's discrimination because of her "record of" a disability, but the second pilot has no recourse.

[15] United claims that the rule against consideration of corrective measures also creates an anomaly, in that a person with an impairment that is not substantially limiting, but the treatment of which is, would purportedly not be disabled. Resp. Br. 30-31. The term "disabled," however, typically does not extend to temporary conditions. 29 C.F.R. pt. 1630, App. § 1630.2(j), ¶ 3 (1998). Thus, the example assumes a treatment

For its part, United contends that the EEOC's construction of the ADA, as applied to the severely myopic, is contrary to the Act's introductory finding that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (1994). United has not disputed, however, the most recent estimate that approximately 8 million Americans share Pilots' severe vision impairment, not at all disproportionate with the total estimate of 43 million disabled. David J. Lee, et al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 Ophthalmology 552, 554 (1998). There is in any event little to be gained by tracking down the precise categories of persons included in the 43 million estimate. Congress intentionally chose *not* to define specific categories of disabled persons in the Act, electing instead to employ a broad definition of the group it wished to protect from discrimination. *See* Harkin Br. 5-9. Moreover, even in the unlikely event that any members of Congress attempted to determine whether the estimate included severe but correctable vision impairments, as explained in the margin, they met with no success.[16]

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with long-term effects more debilitating than the underlying impairment, which no rational person would elect to undergo.

[16] Assuming United has correctly traced Congress' figure to a previous estimate of 36 million disabled in *On the Threshold of Independence*, Resp. Br. 20, that report merely repeated the same estimate from an earlier report entitled *Toward Independence*. *See* National Council on Disability, *On the Threshold of Independence: Progress on Legislative Recommendations from Toward Independence* 12-13 (1988). The later report also stated that the estimate was "roughly validated" by a telephone survey, which simply asked respondents to state whether they had a physical disability, including a visual impairment. *Id.* The earlier report gave no source for the 36 million number, although it did recite an estimate of 8.2 million Americans with visual impairments. National Council on Disability, *Toward Independence: A Report to the President and to the Congress of the United States* 6 (1986). Although the 8.2 million figure was not expressly identified as including or excluding correctable

United also relies on Congress' general statements that the disabled have historically faced disadvantages, but Congress' purposeful use of broad, generalized language – that society has "tended" to discriminate against disabled persons, who "as a group" have faced disadvantages – belies any attempt to fashion a requirement that each particular segment of disabled persons demonstrate a history of discrimination. 42 U.S.C. § 12101(a)(2), (6) (1994). Even if this were required, the record does not support United's assertion that Pilots have suffered no hardship from their vision impairment. Resp. Br. 9. To the contrary, Pilots have encountered pervasive discrimination in the form of "exclusionary qualification standards and criteria" in their chosen field, 42 U.S.C. § 12101(a)(5) (1994), which has prevented them from achieving a lifelong goal and barred them from obtaining the prestigious, highly-paid employment for which they are well-qualified, to their great economic detriment. United's assertion that Pilots' impairment is not commonly singled out by society at large does not relieve it from responsibility for its conduct.

3. United's Assertion That Congress Intended To Exclude Severe Myopia Is Contrary To The Relevant Legislative History And Statutory Purposes.

United does not contest that the House Labor Report and House Judiciary Report endorsed the rule against consideration of corrective measures.[17] *See* Pet. Br. 21-24. Its

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impairments, it was listed alongside statistics of several other commonly correctable conditions, including 17 million hearing impaired, 26.8 million with arthritis, 24.3 million with hypertensive disease, and 16.4 million with heart disease. *Id.* All of these numbers were in turn drawn from Mathematica Policy Research, *Digest of Data on Persons with Disabilities* (1984), which defined an impairment as "a chronic or permanent defect," but again did not distinguish correctable and uncorrectable vision impairments. *Id.* at 2 & Table I.A.1.

[17] United does dispute that the Senate report in the prior session did the same, arguing that the report discussed only "reasonable

dismissal of the only explicit congressional discussion of the issue before this Court as mere "snippets," and its assertion that the reports' examples of impairments corrected by medication or a hearing aid are distinguishable from impairments corrected by "taking a few pills or putting on . . . glasses," Resp. Br. 42, are unconvincing in the extreme.[18]

This legislative history confirms Congress' intent not to overturn prior case law under the Rehabilitation Act, in which courts and litigants repeatedly assumed potentially correctable impairments to be handicaps. See Pet. Br. 25-26.[19] United claims that courts were divided on this issue under the Rehabilitation Act, Resp. Br. 42 n.25, but cannot cite even a single decision prior to 1990 squarely holding that a correctable impairment was not a handicap, even though substantially limiting in the uncorrected state.[20]

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accommodations or auxiliary aids" provided by the employer. Resp. Br. 40. However, the House reports also refer to "reasonable accommodations or auxiliary aids," and then give as examples hearing aids and medication for diabetes. *See also* Pet. Br. 22 n.23.

[18] United quotes a list in the House Labor Report of reasonable accommodations that an employer might be expected to provide to visually impaired persons, which includes such items as electronic aids and brailled material, but not glasses and contact lenses. Resp. Br. 19-20. This merely reflects the fact that corrective lenses, like wheelchairs and hearing aids, are personal use items employees must acquire themselves.

[19] United takes issue with one of the decisions cited by Pilots, *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), arguing that plaintiff's controlled epilepsy was a handicap only because it remained substantially limiting even in the corrected state. The court, however, did not suggest that this was required to reach its result, and it cited multiple other decisions finding epilepsy to be a handicap without regard to the plaintiff's success in controlling the condition. *See, e.g., Mantolete v. Bolger*, 767 F.2d 1416, 1418 (9th Cir. 1985) (cited in *Reynolds*) (assuming plaintiff to be handicapped even though "her epilepsy was adequately controlled").

[20] The two pre-1990 vision cases cited by United did not so hold. Neither decision found the plaintiff's minor nearsightedness to be substantially limiting even in the uncorrected state. *See Trembczynski v.*

As this case illustrates, the legislative history against consideration of corrective measures furthers Congress' goal of disallowing "exclusionary qualification standards and criteria." 42 U.S.C. § 12101(a)(5) (1994). United claims that its position furthers the "competing value" of allowing employers "general discretion to make employment decisions based on physical characteristics." Resp. Br. 33. The fact that Congress chose to exclude from the scope of the Act "minor, trivial impairment[s], such as a simple infected finger," H.R. Rep. No. 101-485(II), at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334, does not at all suggest that Congress ever intended to promote the questionable "value" of allowing physical criteria that are not "job-related and consistent with business necessity." *Id.* at 56, 1990 U.S.C.C.A.N. at 338.

United's construction not only fails to advance the purposes of the Act, it actively undermines those purposes. United's position is that courts should analyze only the corrective measures a person actually uses, regardless of what other measures are reasonably available. Resp. Br. 35. This approach would generate indefensible results[21] and create significant disincentives for disabled persons to seek to correct their handicaps. United does not dispute that its rule creates such a disincentive; it merely hopes that the disincentive will not be great enough to affect the behavior of disabled persons. Resp. Br. 36-37. There is little basis for United's

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City of Calumet City, 1987 WL 16604 (N.D. Ill. Aug. 31, 1987) (holding that vision better than or equal to 20/40 was not an impairment); *Padilla v. City of Topeka*, 708 P.2d 543 (Kan. 1985) (holding that uncorrected binocular vision of 20/50 was not a handicap).

[21] Under this rule, a disabled person who seeks out a means of correcting her condition thereby forfeits the protection of the Act, while one who eschews treatment does not, contrary to this Court's observation that "the disability definition does not turn on personal choice." *Bragdon v. Abbott*, 118 S. Ct. at 2206.

optimism,[22] nor does it explain why Congress would have purposefully created an incentive against the treatment of disabilities, without expressly stating or explaining this intention.

II. UNITED REGARDED PILOTS AS DISABLED IN THE MAJOR LIFE ACTIVITY OF WORKING.

In its response, United defends the result, but not the reasoning, of the lower court's dismissal of Pilots' claim that United regarded them as disabled. It advances two new arguments against the regarded as claim. First, United asserts that it merely applied "physical standards" to select the most qualified applicants. Resp. Br. 48. Second, it contends that the Tenth Circuit erred in defining the relevant class of jobs as all pilot positions at all airlines. Resp. Br. 49. Both arguments at best raise issues of fact.

A. Pilots Have Adequately Alleged That United Falsely Perceived Them To Be Unfit.

United concedes that employees who are not substantially limited by an impairment are still protected "[i]f their employers discriminate against them because of a misunderstanding of their condition." Resp. Br. 35. Pilots allege just such discrimination here. United denies these allegations, claiming that it did not regard Petitioners as physically unfit to be pilots, but merely sought to select the best candidates for its positions. This factual assertion cannot support dismissal of Pilots' claims at the pleadings stage. Fed. R. Civ. P. 12(b)(6).

United misstates the issue when it contends that an employer who deems a person physically unsuited for

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[22] It is not far-fetched to imagine a disabled person, faced with difficulty finding employment and encountering (according to United) entirely lawful discrimination, being forced by economic necessity to give up an important but not life-sustaining corrective device such as a prosthesis or hearing aid.

employment does not "necessarily" or "by definition" regard that person as disabled. Resp. Br. 35 n.19, 44. To prevail on a motion to dismiss, United must convince the Court that as a matter of law a person with a controlled impairment can *never* be regarded as disabled, whenever the employer asserts – without need for evidentiary support – that the person is relatively unsuited physically for the relevant class of jobs.

United offers absolutely no authority to support the notion that an employer's application of such physical criteria is unassailable as a matter of law. Indeed, not one of the cases it cites in its discussion of the "regarded as" prong was decided on a motion to dismiss.[23] Whether an employer's physical standard reflects a perception of a disability or merely legitimate concerns about the employee's relative fitness for the job is a factual question to be decided on the evidence presented to the trial court. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 145 (3d Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 628-30 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

United and its *amici* offer any number of examples where a physical standard might be related to a legitimate job qualification: a pilot who is afraid to fly, an inferior baseball player, a supermarket stocker too short to reach the shelves, a Broadway singer who can't sing. Resp. Br. 47-49 & n.28; EEAC Br. 29. But Pilots have alleged that the standard at issue here is *not* related to their job qualifications, and reflects only myth, stereotype, and unsubstantiated fears. J.A. 24-25, ¶ 28. Based upon unfounded safety concerns, United

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[23] Notably, United quotes *Cook v. State of R.I., Dep't of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 26 (1st Cir. 1993), in support of a distinction between a perception that an applicant is substantially limited in working in a class of jobs and a perception that an applicant will not excel at a particular job. The court in *Cook* concluded, however, that to apply this distinction, "each case must be determined on its own facts." *Id.* The issue therefore "fell squarely to the jury," and the court affirmed a jury verdict for an employee who was perceived to be substantially limited in working. *Id.* at 25-26.

believed Pilots to be, and treated them as, substantially limited in the ability to perform the type of work at issue. J.A. 24-26, ¶¶ 38, 39. These allegations do not "raise an interesting philosophical question" as to whether United perceived Pilots to be substantially limited in the ability to fly, Resp. Br. 47; they raise a critical *factual* question.

United's defense of its vision standard on a motion to dismiss is particularly suspect in that United presumes that the standard furthers safety concerns. United simply disregards Pilots' factual allegations (and the FAA's conclusion) that there is *no* safety justification for its policy. If this allegation is true, then United's policy cannot possibly further the goal of hiring only the best applicants. Indeed, given that it makes no attempt to explain why its policy applies only to new applicants and not to existing pilots in its own fleet,[24] it is difficult to give credence to United's claim that its physical standards are intended to enhance safety rather than merely reduce its own costs.[25] *See* Pet. Br. 5, 8 & n.8.

Under the terms of the Act, qualification standards that tend to screen out the disabled must be justified as "job related" and "consistent with business necessity." 42 U.S.C. §§ 12112(b)(6), 12113(a) (1994). If United honestly believes there is a safety concern, it may defend its conduct on remand by meeting its burden of *proving* the affirmative defense of a direct threat to safety. 42 U.S.C. § 12113(b) (1994); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999);

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[24] The Air Transport Association infers that incumbent pilots have learned safety procedures to offset the effects of their impairment. ATA Br. 25 n.26. Petitioners cannot conceive what safety procedures United might have to offset its (unfounded) fear of "a vision failure at an acutely dangerous moment," Resp. Br. 12, nor any reason why new applicants could not be instructed in such procedures as a reasonable accommodation.

[25] Moreover, if United's minimum standards are intended "to provide the public with the *safest* air transportation," Resp. Br. 48 (emphasis in original), it is strange that United imposes minimal flight experience requirements, J.A. 19, far less than other global airlines, or even the regional airlines for which Petitioners have served as captains.

Rizzo v. Children's World Learning Ctrs., 84 F.3d 758, 764 (5th Cir. 1996); *see also* Labor Report at 58 (employers may not act only on "generalized fears about the safety of the applicant"). As this Court has instructed, for United to prevail on this defense, "the district court will need to conduct an individualized inquiry and make appropriate findings of fact." *Arline*, 480 U.S. at 287.[26] The "determination cannot be based merely on an employer's subjective evaluation." *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985); *see also Knapp v. Northwestern Univ.*, 101 F.3d 473, 483 (7th Cir. 1996) (same), *cert. denied*, 520 U.S. 1274 (1997).

To adopt United's view that employers are entitled as a matter of law to screen applicants on the basis of physical standards would render the "regarded as" prong meaningless. *See Knapp, supra* ("[a]ny physical qualification based on risk of future injury must be examined with special care if the [ADA] is not to be circumvented"). According to United, an employer is always entitled to screen applicants it subjectively believes will not "excel" in the area of safety, even if the supposed safety concern has no basis in fact. Any employee who alleged that he was regarded as substantially limited in working because the employer incorrectly viewed him as a safety threat would face an automatic Rule 12(b)(6) dismissal. This view would leave the protection of the "regarded as" provision of the ADA entirely hollow.

B. The Tenth Circuit Correctly Defined The Relevant Class Of Jobs.

The Tenth Circuit defined the relevant class of jobs requiring similar training, knowledge, and skills to include

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[26] United's *amicus* ATA argues that requiring United to make such an evidentiary showing would create a disincentive against high safety standards, ATA Br. 24, reasoning which applies as easily to the actually disabled prong. There is no basis for exempting the airline industry as a whole from the ADA.

"all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines." J.A. 71-72. United asserts that other airline jobs such as training, management, and administrative positions should be included. This argument also raises a factual question inappropriate for determination on a motion to dismiss, and in any event it does not alter the fact that United regarded Pilots as substantially limited in the major life activity of working.

United's claim that it did not perceive Pilots to be unfit for various non-flying positions which require similar training, knowledge, and skills again raises issues of fact. First, there is a factual question as to whether Petitioners' training, knowledge, and skills pertain to non-flying positions. *See* J.A. 24, ¶ 38(a) (United viewed Pilots as unfit "to perform the type of work at issue here"). "Because a 'person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled,' " this inquiry requires an "individualized assessment." *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 784-85 (3d Cir. 1998) (quoting *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996)). Petitioners are highly trained to *fly aircraft*, J.A. 19-20, not to be teachers or corporate managers or administrators. They are entitled to offer evidence that the categories of jobs United suggests do not involve the same skills and abilities.[27]

Second, even if there are non-flying positions involving Petitioners' piloting skills and abilities, a question of fact remains as to whether United perceived Pilots as qualified for such non-flying positions. *See* J.A. 19, ¶ 15 (United applied

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[27] Even in *Witter v. Delta Air Lines*, 138 F.3d 1366 (11th Cir. 1998), the court defined a broader class of jobs only at the summary judgment stage, after considering the evidence presented, including the plaintiff's own testimony that his training encompassed certain non-flying positions, and the lack of any evidence that defendant excluded him from those positions. *Id.* at 1370.

the same qualification standards to all flight officer positions).[28]

Moreover, even if the relevant class of jobs includes certain non-flying positions, United still regarded Petitioners as disabled in the ability to work. Pilots need not show that United regarded them to be utterly unable to work within the relevant class of jobs, *Bragdon v. Abbott*, 118 S. Ct. at 2206, but only substantially limited in the ability to work in that class. This burden of showing an impact on a class of jobs was "not intended to require an onerous evidentiary showing." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 340-41 (1998); *McKay v. Toyota Motor Mfg., U.S.A.*, 110 F.3d 369, 378 (6th Cir. 1997). Surely being unfit to fly an airplane would be a substantial limitation on Petitioners' ability to work in the class of jobs requiring one to be trained, knowledgeable, and skillful as a pilot.[29] *Compare Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998) (holding that a teacher who was disqualified from classroom teaching positions but could work as a tutor or administrator had raised a material issue of fact whether he was disabled).[30]

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[28] There is nothing in the record to suggest that United distinguishes between flying and non-flying positions requiring any level of piloting experience. United lists no separate job category for flight trainers or instructors, instead apparently filling such positions from its pool of flight officers. *See* United Air Lines, Brief Airline Job Descriptions, <http://www.ual.com/airline/our_company/descriptions.asp>. All flight officer positions require vision no worse than 20/100. United Air Lines, Flight Officer Positions, <http://www.ual.com/airline/our_company/officer.asp>.

[29] Conversely, a person whose vision would prevent him from flying an airplane is not substantially limited in working in a relevant class of jobs if he has *not* been trained as a pilot. *Burbank v. City of Idaho Falls*, 1996 WL 518098 (9th Cir. Sept. 11, 1996) (relied upon by United).

[30] Pilots' position is analogous to a lawyer informed midway through his career that he could no longer practice law or work in any position that requires membership in the bar. Even if he could find work as an office manager for a law firm, as an editor for a legal publisher, or as a bar review instructor, his perceived impairment still "constitutes for the particular

Nearly any employer could point to a handful of teaching or administrative or other tangentially related positions that a rejected employee could fill. Congress cannot have intended for the "regarded as" provision to be so easily circumvented.

Respectfully submitted this 12th day of April, 1999.

VAN AARON HUGHES
Counsel of Record
for Petitioners
TUCKER K. TRAUTMAN
KRISTIN L. WETENKAMP
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, CO 80202
Telephone: (303) 464-9409

Attorneys for Petitioners

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person a significant barrier to employment." *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986).

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 97-1943

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON AND KIMBERLY HINTON, PETITIONERS

v.

UNITED AIR LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

C. GREGORY STEWART
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

PAULA R. BRUNER
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

33pp

QUESTIONS PRESENTED

1. Whether the determination that a person has a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12102(2)(A), must be made without regard to mitigating measures, such as medicines, corrective lenses, or other prosthetic devices.

2. Whether petitioners' complaint stated a claim that respondent regarded them as substantially limited in the major life activity of working when it refused to hire them for any of its jobs as pilot because of their impairment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument	7
I. Mitigating measures should not be considered in determining whether a person has a "disability" under the Americans with Disabilities Act	7
II. Petitioners adequately alleged that respondents regarded them as substantially limited in the major life activity of working, and they therefore stated a claim that respondents "regarded them" as disabled	12
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Arnold v. *United Parcel Serv., Inc.*, 136 F.3d F.3d 854 (1998)	9
Bragdon v. *Abbott*, 118 S. Ct. 2196 (1998)	16
Briscoe v. *LaHue*, 460 U.S. 324 (1983)	18
Doane v. *City of Omaha*, 115 F.3d 624 (8th Cir. 1997), cert. denied, 522 U.S. 1048 (1998)	13
E.E. Black, Ltd. v. *Marshall*, 497 F. Supp. 1088 (D. Haw. 1980)	18
Forrissi v. *Bowen*, 794 F.2d 931 (4th Cir. 1986)	18
Hardin v. *Pitney-Bowes*, 451 U.S. 1008 (1981)	18
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)	18
Jasany v. *United State Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985)	18
School Bd. v. *Arline*, 480 U.S. 273 (1987)	17
Washington v. *HCA Health Servs.*, 152 F.3d 464 (5th Cir. 1998)	9
Young v. *Runyon*, No. 01942399, 1995 WL 241476 (EEOC Apr. 19, 1995)	11

Statutes, regulations and rule:	Page
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*	*passim*
42 U.S.C. 12102(2)	3
42 U.S.C. 12102(2)(A)	3, 7, 10, 12
42 U.S.C. 12102(2)(C)	4, 12
42 U.S.C. 12112(a)	12, 19
42 U.S.C. 12113(b)	
Rehabilitation Act, 29 U.S.C. 701 *et seq.*	18
14 C.F.R. 67.103(a)	15
29 C.F.R. Pt. 1630:	
Section 1630.2(h)(1)	7
Section 1630.2(j)(1)	13
Section 1630.2(j)(1)(ii)	10
Section 1630.2(j)(2)	13
Section 1630.2(j)(3)	19
Section 1630.2(j)(3)(i)	13, 14, 16
App.:	
§ 1630.2(h)	4
§ 1630.2(j)	14, 16, 18
§ 1630.2(*l*)	17
Fed. R. Civ. P. 12(b)(6)	2
Miscellaneous:	
David J. Lee et al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Nonhispanic Adults*, 105 Ophthalmology 522 (1998)	11
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990)	10, 17
National Center for Health Statistics, U.S. Dep't of Health & Human Servs., *Eye Care Visits and Use of Eyeglasses or Contact Lenses* (Vital & Health Statistics Series 10, No. 145, 1984)	10-11
S. Rep. No. 116, 101st Cong., 1st Sess. (1989)	9, 10
U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual* (1992)	11

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INTEREST OF THE UNITED STATES

This case concerns the proper definition of "disability," a threshold question addressed in virtually every case brought under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* Congress delegated to the Equal Employment Opportunity Commission (EEOC) and Department of Justice authority to promulgate regulations and to enforce the provisions of the ADA. Both agencies have issued extensive regulations and interpretive guidance concerning the definition of the term "disability." The EEOC participated as *amicus curiae* on the petition for rehearing and suggestion for rehearing en banc in this case in the

court of appeals. In response to the Court's invitation, the United States and the EEOC filed a brief as *amicus curiae* at the petition stage in this case.

STATEMENT

Petitioners brought this case under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, after they were denied the opportunity to compete for jobs because without corrective lenses their vision is poor. The district court dismissed petitioners' complaint on the ground that it failed to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). The court of appeals affirmed. Pet. App. A1-A25.

1. The complaint alleged that petitioners, who are identical twin sisters, sought commercial pilot positions with respondent in 1992. J.A. 20, 22. Petitioners alleged that they were regional airline pilots at the time, and that they amply satisfied the basic age, education, experience, and FAA certification qualifications for a pilot's job with respondent. J.A. 19-20. They claimed that respondent granted them interviews for pilot positions, but informed each of them at the time of the interview that her uncorrected vision did not comply with respondent's minimum requirements. J.A. 21, 23. Petitioners alleged that respondent "rejected [petitioners] on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability." J.A. 26.

Each petitioner alleged that her uncorrected eyesight is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but each petitioner also alleged that "[w]ith the use of corrective lenses, [she] has vision that is 20/20 or better." J.A. 23. They alleged that, without corrective lenses, each of them "effectively can-

not see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores." J.A. 24. They also alleged, however, that "[w]ith corrective measures, * * * [each of them] function[s] identically to individuals without a similar impairment." *Ibid.*

Petitioners alleged that respondent's policy of not hiring individuals with their vision deficiency as pilots "is not limited to certain models of aircraft, certain air routes, or certain flight conditions." J.A. 25-26. In addition, they alleged that respondent's rejection of them "is not based on an isolated mismatch between one employer and these applicants." J.A. 26. The complaint added that "[t]here is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines." *Ibid.* The complaint stated that respondent's policy "blocks thousands of opportunities throughout the world." *Ibid.*

2. The district court ruled that petitioners had failed to state a claim upon which relief may be granted. Pet. App. A27-A37. Under the ADA:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. 12102(2).

The district court first examined the existence of an actual limiting impairment under clause (A). The court stated that "numerous federal courts have concluded that the need for corrective eyewear is commonplace

and does not substantially limit major life activities," Pet. App. A32, and that petitioners therefore "have not stated a claim that they are substantially limited in the major life activity of seeing," *id.* at A33. The court also held that petitioners' "common moderate vision impairment * * * does not substantially limit their ability to work within the meaning of the ADA." *Id.* at A34. In the court's view, "the ADA was intended to protect only a limited class of persons; specifically, individuals who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared." *Id.* at A35.

The district court also held that petitioners had failed to state a claim that respondent "regarded" them as disabled under clause (C) of the disability definition. The court stated that "[t]he statutory reference to a substantial limitation indicates that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." Pet. App. A36-A37. In the court's view, "[a]t most, [petitioners] can establish that [respondent] regarded them as unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at A37. The court added that petitioners "have had no difficulty obtaining other jobs in their field prior to this one." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A25. Guided by the EEOC's regulatory definition of "impairment," under which "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices," 29 C.F.R. Pt. 1630 App. § 1630.2(h), the court held that petitioners had adequately alleged that they had an "impairment" of vision under the ADA. Pet.

App. A9-A11. The court held, however, that "[t]he determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." *Id.* at A16. The court concluded that "while [petitioners'] uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing," they "can prove no set of facts upon which relief may be granted" because their vision is correctable. *Id.* at A17-A18.

The court also held that they had not set forth a claim upon which relief could be granted under the "regarded as" prong of the statute. The court stated that "in order to establish a disability under the 'regarded as' prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." Pet. App. A21. Although the court accepted as true petitioners' allegation that they "were disqualified from 'all pilot positions' as they alleged in their Amended Complaint," the court nonetheless held that petitioners "cannot show disqualification from a 'class of jobs.'" *Id.* at A22 n.10.

SUMMARY OF ARGUMENT

Petitioners' complaint states a claim that they are disabled within the meaning of the ADA. There can be no dispute that "seeing" is a major life activity under the ADA. The complaint alleges that their vision is so impaired that, without eyeglasses, they cannot see well enough to conduct numerous everyday activities. Accordingly, petitioners alleged that they have a physical impairment that substantially limits a major life activity. That does not, of course, establish that myopia

is always a disability under the ADA. Because the inquiry into disability under the ADA must be undertaken on an individualized basis, other individuals with vision that is better than that of petitioners, but that is nonetheless somewhat impaired, may not satisfy the statutory definition of disability. Petitioners' complaint was sufficient, however, to allege that they are disabled.

The court of appeals held that petitioners had not stated a claim that they were disabled under the ADA because their complaint stated that their poor vision was fully correctable through the use of corrective lenses. As we explain in our brief in *Murphy* v. *United Parcel Service*, No. 97-1992, however, the question whether an individual has a disability under the ADA must be answered without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment. Although *Murphy* involves high blood pressure, rather than poor vision, there is nothing about poor vision that would justify adopting a different rule in this case. Accordingly, the court of appeals erred in taking mitigating measures into account and thereby concluding that petitioners' complaint had not properly alleged a disability under the ADA.

Petitioners' complaint also adequately alleged that they were "regarded as" substantially limited in the major life activity of working by respondent. Petitioners' complaint alleges that respondent would not consider them for any of its pilot positions because of their poor uncorrected vision, and the reasonable inference can be drawn from the complaint that respondent adopted that policy because it regarded them as unable safely to operate an airplane. Those allegations are sufficient to state a claim that petitioners were "regarded as" disabled by respondents. While respondent

may ultimately show that petitioners are not qualified for the job or that its failure to hire petitioners is otherwise justified, the court improperly pretermitted the inquiry before petitioners were given the opportunity to support their claim.

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A PERSON HAS A "DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT

The term "disability" within the meaning of the Americans with Disabilities Act of 1990, is defined in terms of three separate, alternative criteria. Under the first criterion—actual disability—a disability is "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual. 42 U.S.C. 12102(2)(A). Petitioners' poor vision is a "physical * * * impairment" that satisfies the regulatory definition of that term, *i.e.*, a "physiological disorder, or condition, * * * affecting * * * special sense organs." 29 C.F.R. 1630.2(h)(1). The remaining question is thus whether that impairment "substantially limits" any of petitioners' major life activities. The answer to that question turns on whether petitioners' impairment is analyzed in its mitigated or unmitigated state.

A. We explain in our brief as amicus curiae in *Murphy* v. *United Parcel Service*, No. 97-1992, that the existence of a disability under the ADA must be assessed without regard to mitigating or ameliorative measures. That is the most reasonable interpretation of the Act itself, and Congress's intent in this regard is set forth with unusual clarity in all three of the relevant committee reports. See 97-1992 U.S. Br. at 9-11.

Moreover, assessing the existence of a disability without regard to mitigating measures is most consistent with the ADA's basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individuals' abilities. It is also most consonant with the structure of the statute, which generally addresses at a stage later than the threshold determination of disability issues regarding the various adjustments that may be required to enable a disabled person to work, *e.g.*, whether the employer is being required to make a reasonable accommodation, whether the employee is genuinely qualified for the job, and whether the employee poses a health or safety threat to others. See 97-1992 U.S. Br. at 11-15. To take mitigating measures into account at the threshold stage of determining the existence of a disability would distort the analysis required under the scheme that Congress enacted. It would also would inject uncertainty and instability into the system, because individuals would gain and lose status as "disabled" depending on the changing effectiveness of their regimen of mitigating measures and their changing decisions regarding whether they should continue taking those mitigating measures in light of their unwanted side effects. See 97-1992 U.S. Br. at 16-17.

Finally, we explain in our brief in *Murphy* that the agencies entrusted with issuing regulations to carry out the ADA have consistently taken the position that the existence of a disability should be assessed without regard to mitigating measures. The EEOC has taken that position in interpretive guidelines that were subject to notice and comment at the same time as—and together with—the formal ADA regulations. Because the EEOC's guidelines state its interpretation of its

own ADA regulations, they are entitled to controlling weight, and they therefore establish that mitigating measures should not be taken into account in assessing the existence of a disability. See 97-1992 U.S. Br. at 17-20.

B. Assessed in its unmitigated state, petitioners' impairment—as set forth in their complaint—unquestionably limits their major life activity of seeing. Indeed, the court of appeals conceded that fact. Pet. App. A18 ("[Petitioners'] uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing."). Because the question whether an impairment constitutes a disability must be assessed without taking mitigating measures into account, petitioners' complaint states a claim that they were actually disabled.

Some courts of appeals that have accepted the no-mitigation rule as a general matter have expressed reluctance to follow it in the context of correctable vision impairments. For example, the First Circuit in *Arnold* v. *United Parcel Service, Inc.*, 136 F.3d 854, 863 (1998), held unequivocally that disabilities (in that case, diabetes) are generally to be assessed under the ADA without regard to mitigating measures. The court nonetheless noted that it "might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses," because "[t]he availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of 'minor, trivial impairment[],' * * * that would not be considered a disability under the ADA." *Id.* at 866 n.10 (quoting S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989)). Similarly the Fifth Circuit in *Washington* v. *HCA Health Services*, 152 F.3d 464, 471 (1998), held that many disabilities (in that case Adult Stills disease)

should be assessed without mitigating measures, but noted that some mitigating measures, such as hip replacements, might amount to permanent corrections that remove the disability, and speculated that eyeglasses might be properly placed in the same category.

Nothing in the text or history of the ADA supports the suggestion in dicta of these two courts that mitigating measures should sometimes be considered at the threshold stage. Indeed, it would be difficult to find a principled basis for distinguishing for this purpose between myopia and other correctable disorders, such as epilepsy and diabetes, which Congress unquestionably intended to bring within the scope of the ADA. See S. Rep. No. 116, *supra*, at 31, 39, 62; H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 52, 62, 79, 104 (1990); *id.*, pt. 3, at 28, 42, 50. Congress adopted a test for identifying those impairments serious enough to warrant coverage under the ADA: the impairment must "substantially limit[] one or more of the major life activities." 42 U.S.C. 12102(2)(A). That test asks not whether the impairment is uncorrectable, but whether—in its uncorrected state—its effect is substantial. And the EEOC has elaborated on that test by providing that "*substantially limits* means * * * [s]ignificantly restricted * * * as compared to * * * the average person in the general population." 29 C.F.R. 1630.2(j)(1)(ii). Thus, moderate myopia might be excluded from coverage, not because it is correctable, but because it is quite prevalent in the general population;[1] an individual with moderate myopia therefore

[1] One government study found that 63% of adults wear eyeglasses or contact lenses. See National Center for Health Statistics, U.S. Dep't of Health & Human Servs., *Eye Care Visits and Use of Eyeglasses or Contact Lenses* 29 (Vital & Health Statistics Series 10, No. 145, 1984). A recent article reporting data from older surveys of American adults under 75 indicates that about five to six percent of the population has uncorrected distance visual acuity of 20/200 or worse. See David J. Lee et al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 Ophthalmology 552, 556 (1998).

may not be "significantly restricted" compared with the average person.[2] But petitioners' complaint in this case alleges that they have a vision impairment severe enough to "constitute[] legal blindness for purposes of Supplemental Security Insurance disability classification and also under the law of numerous states" if it could not be corrected. J.A. 24. That is sufficient to state a claim that they are substantially limited in the major life activity of seeing.

Although petitioners have stated a claim, the limits on that claim are significant. As noted above, relatively few adults have vision as poor as that alleged by petitioners, and the fact that they have stated a claim that they are disabled therefore does not mean that others with better vision would necessarily be able to do so. See note 1, *supra*. In addition, although petitioners have stated a claim that respondent discriminated against them on the ground of their disability, that kind of claim is likely to be rare; employers do not commonly discriminate on the basis of poor uncorrected vision, at least outside a few contexts, such as the transportation industry and law enforcement. Finally,

[2] The Department of Justice and the EEOC have both reached that conclusion. See, *e.g.*, U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual*, II-2.4000 (1992) ("A person with a minor vision impairment, such as 20/40 vision, does not have a substantial [limitation] of the major life activity of seeing."); *Young* v. *Runyon*, No. 01942399, 1995 WL 241476, at *4 (EEOC Apr. 19, 1995) (judging individual with uncorrected vision of 20/30 not substantially limited).

the fact that petitioners or others like them may be disabled and may suffer discrimination on account of their disability is not sufficient to make out a claim under the ADA. Employers like respondent may refuse to hire even disabled individuals on the ground that they are not "qualified" for the jobs they seek, 42 U.S.C. 12112(a), or if their disability would "pose a direct threat to the health or safety of other individuals," 42 U.S.C. 12113(b).

II. PETITIONERS ADEQUATELY ALLEGED THAT RESPONDENTS REGARDED THEM AS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF WORKING, AND THEY THEREFORE STATED A CLAIM THAT RESPONDENTS "REGARDED" THEM AS DISABLED

An individual is "disabled" under the ADA not only if the individual has an impairment "that substantially limits one or more of the major life activities of such individual," 42 U.S.C. 12102(2)(A), but also if the individual is "regarded as having such an impairment," 42 U.S.C. 12102(2)(C). Petitioners' complaint adequately states a claim that respondent regarded them as having impairments (their poor vision) that substantially limited them in the major life activity of working.[3] The Tenth Circuit erred in ruling to the contrary.

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[3] The court of appeals stated (Pet. App. A19 n.9) that the complaint alleged that respondent regarded petitioners as substantially limited only in the major life activity of working. The district court had read the complaint as alleging both seeing and working as the major life activities at issue (*id.* at A36), and petitioners had so argued in the court of appeals (*id.* at A19). Taking all allegations of the complaint as true and drawing all the inferences in favor of the petitioners, the complaint can fairly be read to claim that respondent refuses to hire job applicants with uncorrected eyesight worse than 20/100 because respondent regards those applicants as substantially limited in the major life activity of seeing, as well as working. If so, petitioners stated a claim under this theory, as well as their theory relying on the major life activity of working. See *Doane* v. *City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997), cert. denied, 522 U.S. 1048 (1998).

As noted above, the EEOC regulations generally provide that an individual is substantially limited in a major life activity if the individual is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration under which" the individual can perform the activity as compared to the "average person in the general population." 29 C.F.R. 1630.2(j)(1).[4] The regulations provide special guidance, however, in determining the substantiality of a limitation on the major life activity of working. In that context, the regulations provide that "[t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). The regulations add that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Ibid.*

The requirement that plaintiffs identify "a class of jobs or a broad range of jobs in various classes," 29

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[4] The regulations also provide that "[t]he following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. 1630.2(j)(2).

C.F.R. 1630.2(j)(3)(i), was not intended to impose an onerous burden. It was intended to ensure that individuals who had impairments that excluded them from a small sub-set of jobs that required "extraordinary" skills, see 29 C.F.R. Pt. 1630 App. § 1630.2(j) at 349, but whose impairment would not bar them from using the same "training, skills and abilities" in a broader range of jobs, 29 C.F.R. 1630.2(j)(3)(i), were not deemed disabled.

A. Petitioners' complaint adequately alleges a "regarded as" disability because it alleges that respondent regarded them as significantly restricted in their ability to perform a class of jobs because of their poor vision. The court of appeals based its conclusion that petitioners had failed to state a claim on a single aspect of the "regarded as" analysis. The court did not question that petitioners properly alleged that respondent regarded them as having an impairment within the meaning of the ADA. Nor did the court question that petitioners properly alleged that working was for them a major life activity. The court held, however, that petitioners had failed to state a claim that respondents regarded them as substantially limited in that major life activity, because, in the court's view, petitioners had failed to state a claim that respondents regarded them as significantly restricted in their ability to perform a class of jobs. Pet. App. A22.

The court of appeals' conclusion is erroneous. Petitioners alleged that respondent stated that their "uncorrected vision disqualified [them] from employment as a United pilot." J.A. 21, 23. Moreover, petitioners alleged that "[respondent's] policy * * * is not limited to certain models of aircraft, certain air routes, or certain flight conditions." J.A. 25-26. They also alleged that respondent's policy "is not based on an isolated

mismatch between one employer and these applicants." J.A. 26. Indeed, they specifically alleged that "[t]here is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines." *Ibid.*

Those allegations are ample to state a claim that respondent viewed petitioners as significantly restricted in their ability to perform a class of jobs. Indeed, petitioners' complaint is quite specific in alleging the basis for respondent's view—that respondent asserted its vision requirements were a "rational, job-related, safety requirement." J.A. 24.[5] In support of that allegation, petitioners could certainly attempt to prove that respondent believed that individuals with a visual impairment like that of petitioners could not safely fly an airplane. Such proof would be sufficient to demonstrate that respondent regarded petitioners as excluded from being airplane pilots—a "class of jobs" for which they were amply trained—and it would thereby demonstrate that respondent regarded them as substantially limited in their major life activity of working.

B. The court of appeals concluded that petitioners failed to state a claim of exclusion from a class of jobs or a broad range of jobs in various classes, because they allege only that respondent regards them as ineligible for positions as global airline pilots, but not for positions such as the ones they hold (at other airlines) as regional

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[5] Petitioners alleged that "[e]ach possessed (and still does) a First-Class medical certificate from the Federal Aviation Administration, which indicates fitness to fly in any capacity, including that of airline captain." J.A. 20. FAA regulations require "[d]istant visual acuity of 20/20 or better in each eye separately, with or without corrective lenses." 14 C.F.R. 67.103(a).

airline pilots. Pet. App. A22-A24. According to the court of appeals, the relevant class of jobs "would include, but not be limited to, all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines." *Id.* at A22-A23.

That conclusion misreads petitioners' complaint. Petitioners allege that respondent regards petitioners as unqualified for any pilot position, because respondent believes they cannot safely fly an airplane. Thus, while petitioners and respondent both acknowledge that other employers, such as petitioners' current employers, may have a different view, that fact does not in any way contradict the claim that respondent regards petitioners as ineligible for the entire broad class of jobs at issue.[6] As the court of appeals itself correctly noted,

[6] If petitioners' complaint alleged (as it does not) that respondent regarded petitioners as qualified for positions as regional airline pilots, and disqualified only from positions as global airline pilots, that too might well state a claim under the ADA. The EEOC's interpretive guidance suggests that a person barred from work as a commercial pilot because of a vision impairment but eligible for work as a commercial co-pilot or a pilot for a courier service would not suffer a substantial limitation in the major life activity of working. 29 C.F.R. Pt. 1630 App. § 1630.2(j). That example is given, however, to illustrate the general principle in the EEOC's regulations that exclusion from one specialized job in a broader class does not constitute a "substantial limitation" unless the excluded individual is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). Cf. *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2206 (1998) ("The Act addresses substantial limitations on major life activities, not utter inabilities."). Thus, the example assumes that commercial pilot positions are not sufficiently numerous or important that exclusion from them would "significantly restrict" a qualified and trained individual's ability to obtain work as a pilot generally. That assumption has been challenged by petitioners, and in any event it appears to be premised on the counterfactual hypothesis that a person excluded for vision impairment from pilot positions could be hired as a co-pilot. To the extent the example may be premised on inaccurate factual assumptions, of course, the general principle and not the example controls.

"[i]t is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters." Pet. App. A22. Nothing in the ADA suggests that a particular employer who regards an individual as disabled—perhaps because of the "prejudice, stereotypes, or unfounded fear," *School Bd.* v. *Arline*, 480 U.S. 273, 287 (1987), that the ADA and its predecessor statute were designed to eradicate—has a defense under the ADA solely because other employers have freed themselves from those prejudices. See 29 C.F.R. Pt. 1630 App. § 1630.2(*l*) ("An individual rejected from a job because of the 'myths, fears, and stereotypes' associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field."); H.R. Rep. No. 485, *supra*, pt. 3, at 30 (similar).

The court of appeals stated that petitioners' "reasoning would imply that anyone who failed to obtain a single job because of a single requirement of employment would become a 'disabled' individual because the employer would thus be regarding the applicant's failure as substantially limiting in the major life activity of working." Pet. App. A24. That is mistaken.

To be sure, evidence that an employer had denied a plaintiff a job on the basis of the plaintiff's impairment may well provide the basis for an inference that the employer viewed the plaintiff as substantially limited in the major life activity of working. But the employer

could introduce contrary evidence that it regarded the plaintiff as unable to satisfy a particular requirement applicable only to that particular job.[7] The ultimate question in such a case would be whether the employer or the plaintiff was correct regarding the reason why the employer refused to hire the plaintiff; only if it were ultimately determined that the employer did in fact regard the plaintiff as unsuitable for a class of jobs would the plaintiff be "regarded as" disabled under the ADA.[8] In short, if the plaintiff prevailed, it would

[7] Three leading cases decided under the Rehabilitation Act, 29 U.S.C. 701 *et seq.*, and relied on by the EEOC in its interpretive guidance, see 29 C.F.R. Pt. 1630 App. § 1630.2(j) at 349, illustrate the distinction between a particular job and a class of jobs. See *Forrisi* v. *Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (holding that employer "never doubted [plaintiff's] ability to work in his chosen occupation of utility systems repair," but "merely saw him as unable [because of his acrophobia] to exercise his acknowledged abilities above certain altitudes"); *Jasany* v. *United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (holding that defendant whose strabismus (crossed eyes) precluded him from operating a particular machine at the post office, but whose condition "never had any effect whatsoever on any of his activities, including his * * * ability to carry out other duties at the post office," was not "regarded as" disabled); *E.E. Black, Ltd.* v. *Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980) (explaining that "[a] person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities," but that "[a]n individual with acrophobia who was offered 10 deputy assistant accountant jobs with a particular company, but was disqualified from one job because it was on the 37th floor" was not disabled).

[8] Issues regarding state of mind have long been recognized as particularly suitable for resolution by the ultimate trier of fact. See *Briscoe* v. *LaHue*, 460 U.S. 325, 343 n.29 (1983); *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979); see also *Hardin* v. *Pitney-Bowes*, 451 U.S. 1008, 1008-1009 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

simply establish that, based on all of the facts of the case, the plaintiff had made out her claim that the employer had denied the plaintiff the single job because the employer regarded the plaintiff as having an impairment that, in the employer's view, would disqualify plaintiff from a "class of jobs or a broad range of jobs in various classes." 29 C.F.R. 1630.2(j)(3).

C. Based on the above analysis, petitioners stated a claim that they were "regarded as" disabled. That conclusion does not, of course, establish that petitioners can in fact produce evidence to make out their claim or that respondent will not produce convincing evidence to the contrary. Nor does it preclude respondent from establishing that it is not liable because petitioners are not "qualified" for the jobs they seek, 42 U.S.C. 12112(a), or because petitioners' uncorrected vision would "pose a direct threat to the health or safety of other individuals," 42 U.S.C. 12113(b). Because their complaint adequately states a claim under the ADA, however, the court of appeals erred in holding that it must be dismissed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

BILL LANN LEE
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys

C. GREGORY STEWART
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

PAULA R. BRUNER
Attorney
Equal Employment Opportunity Commission

FEBRUARY 1999

No. 97-1943 (4)

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, *et al.*,

Petitioners,

—v.—

UNITED AIR LINES, INC.,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

Louis M. Bograd
(*Counsel of Record*)
American Civil Liberties Union
Foundation
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 234-1817

Chai R. Feldblum
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9595

Steven R. Shapiro
Matthew A. Coles
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

38pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE ADA WAS INTENDED TO BROADLY PROTECT QUALIFIED PERSONS WITH PHYSICAL AND MENTAL IMPAIRMENTS FROM DISCRIMINATION IN EMPLOYMENT 4

A. Congress, In Enacting The ADA, Sought To Provide Broad Protection Against Employment Discrimination For Persons With Disabilities 4

B. Congress Adopted The ADA's Definition Of Disability From Title V Of The Rehabilitation Act, Which Had Been Interpreted Expansively 5

C. The Critical Issue Under the ADA Is Whether The Plaintiff Is Qualified To Perform The Essential Functions Of The Job; Courts That Construe The ADA's Definition Of Disability Too Narrowly Never Reach This Critical Inquiry 9

Page

II. UNDER THE ADA, WHETHER A PHYSICAL OR MENTAL IMPAIRMENT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY MUST BE DETERMINED WITHOUT REGARD TO MITIGATING OR CORRECTIVE MEASURES .. 12

III. AN EMPLOYER WHO TAKES AN ADVERSE EMPLOYMENT ACTION AGAINST A PERSON BECAUSE OF A PHYSICAL OR MENTAL IMPAIRMENT NECESSARILY REGARDS THAT PERSON AS SUBSTANTIALLY LIMITED IN WORKING AND HENCE AS DISABLED FOR PURPOSES OF THE ADA ... 20

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Ackerman v. Western Elec. Co.,
643 F.Supp. 836 (N.D.Cal. 1986) 7

Arnold v. United Parcel Service, Inc.,
136 F.3d 854 (1st Cir. 1998) 5, 11, 16, 17, 18, 19

Bailey v. Tisch,
683 F.Supp. 652 (S.D. Ohio 1988) 7

Bartlett v. New York State Bd. of Law Examiners,
156 F.3d 321 (2d Cir. 1998) 16

Bentivegna v. United States Dep't of Labor,
694 F.2d 619 (9th Cir. 1982) 7

Bolthouse v. Continental Wingate Co.,
656 F.Supp. 620 (W.D.Mich. 1987) 7

Bolton v. Scrivner,
36 F.3d 939 (10th Cir. 1994) 27

Bowen v. American Hosp. Ass'n,
476 U.S. 610 (1986) 8

Bragdon v. Abbott,
524 U.S. __, 118 S.Ct. 2196 (1998) 6, 7, 15

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 15

Coley v. Secretary of Army,
689 F.Supp. 519 (D.Md. 1987) 7

Colin K. v. Schmidt,
715 F.2d 1 (1st Cir. 1983) 7

Dancy v. Kline,
639 F.Supp. 1076 (N.D.Ill. 1986) 7

Daubert v. United States Postal Service,
733 F.2d 1367 (10th Cir. 1984) 7

de la Torres v. Bolger,
781 F.2d 1134 (5th Cir. 1986) 8

Deas v. River West, L.P.,
152 F.3d 471 (5th Cir. 1998) 24

Doane v. City of Omaha,
115 F.3d 624 (8th Cir. 1997),
cert. denied, 118 S.Ct. 693 (1998) 16

Doe v. Region 13 Mental Health-Mental Retardation Comm'n,
704 F.2d 1402 (5th Cir. 1983) 7

Doherty v. Southern College of Optometry,
659 F.Supp. 662 (W.D.Tenn. 1987) 7

Ellison v. Software Spectrum,
85 F.3d 187 (5th Cir. 1996) 26

Fynes v. Weinberger,
677 F.Supp. 315 (E.D.Pa. 1985) 8

Gardner v. Morris,
752 F.2d 1271 (8th Cir. 1985) 7

Gilday v. Mecosta County,
124 F.3d 760 (6th Cir. 1997) 16

Harris v. H & W Contracting Co.,
102 F.3d 516 (11th Cir. 1996) 16, 17

Holihan v. Lucky Stores, Inc.,
87 F.3d 362 (9th Cir. 1996),
cert. denied, 117 S.Ct. 1349 (1997) 16

Homeyer v. Stanley Tuchin Associates,
91 F.3d 959 (7th Cir. 1996) 27

Kampmeier v. Nyquist,
553 F.2d 296 (2d Cir. 1977) 7

Kirkingburg v. Albertson's, Inc.,
143 F.3d 1228 (9th Cir. 1998),
cert. granted,
67 U.S.L.W. 3433 (Jan. 8, 1999) 5, 10

Kling v. County of L.A.,
633 F.2d 876 (9th Cir. 1980) 8

Matczak v. Frankford Candy and Chocolate Co.,
136 F.3d 933 (3d Cir. 1997) 16

Miller v. City of Springfield,
146 F.3d 612 (8th Cir. 1998) 24

New York State Ass'n for Retarded Children v. Carey,
612 F.2d 644 (2d Cir. 1979) 7

Olson v. GE Astrospace,
101 F.3d 947 (3d Cir. 1996) 26

Poole v. South Plainfield Bd. of Educ.,
490 F.Supp 948 (D.N.J. 1980) 7

Prewitt v. United States Postal Service,
662 F.2d 292 (5th Cir. 1981) 7

Pushkin v. University of Colo.,
658 F.2d 1372 (10th Cir. 1981) 7

Redlich v. The Albany Law School of Union University,
899 F.Supp. 100 (N.D.N.Y. 1995) 27

Reynolds v. Brock,
815 F.2d 571 (9th Cir. 1987) 7

Ross v. Beaumont Hosp.,
687 F.Supp. 1115 (E.D.Mich. 1988) 7

Roth v. Lutheran General Hospital,
57 F.3d 1446 (7th Cir. 1995) 16

Ryan v. Grae & Rybicki,
135 F.3d 867 (2d Cir. 1998) 24

School Bd. of Nassau County v. Arline,
480 U.S. 273 (1987) . . . . . *passim*

Skorup v. Modern Door Corp.,
153 F.3d 512 (7th Cir. 1998) 24

Steven v. Stubbs,
576 F.Supp. 1409 (N.D.Ga. 1983) 8

Strathie v. Dep't of Transp.,
547 F.Supp. 1367 (E.D.Pa. 1982) 7

Thompson v. Holy Family Hosp.,
121 F.3d 537 (9th Cir. 1997) 24

Tudyman v. United Airlines,
608 F.Supp. 739 (C.D.Cal. 1984) 8

Ward v. Mass. Bay Transp. Auth.,
550 F.Supp. 1310 (D.Mass. 1982) 7

Washington v. HCA Health Services of Texas, Inc.,
152 F.3d 464 (5th Cir. 1998) 16

Witter v. Delta Air Lines, Inc.,
138 F.3d 1366 (11th Cir. 1998) 24

Wolff v. South Colonie Cent. School Dist.,
534 F.Supp. 758 (N.D.N.Y. 1982) 7

Statutes and Regulations

Americans with Disabilities Act,
42 U.S.C. §12101 *et seq.* . . . . . *passim*
42 U.S.C. §12101(a)(1) 4
42 U.S.C. §12101(a)(9) 5
42 U.S.C. §12101(b)(1) 4
42 U.S.C. §12102(2) 5
42 U.S.C. §12102(2)(C) 20
42 U.S.C. §12111(8) 9
42 U.S.C. §12111(9)(A) 9
42 U.S.C. §12111(9)(B) 9
42 U.S.C. §12112(a) 9
42 U.S.C. §12112(b)(5) 9
42 U.S.C. §12116 14
42 U.S.C. §12201(a) 8

Rehabilitation Act, 29 U.S.C. §794 . . . . . *passim*

28 C.F.R. §35.104 14

28 C.F.R. §36.104 14

28 C.F.R. pt.35, App.A 15

28 C.F.R., pt.36, App.B 15

29 C.F.R. pt.1630, App. 14, 21, 24, 26, 27

29 C.F.R. §1630.2(j) 14

29 C.F.R. §1630.2(j)(3) 25

Page

29 C.F.R. §1630.2(l) 20

56 Fed.Reg. 35,726 (1991) 14

Legislative History

136 Cong.Rec. H4629 (daily ed. July 12, 1990) 5

136 Cong.Rec. S9695 (daily ed. July 13, 1990) 5

H.R. Rep. No. 101-485, pt.2 (1990) 4, 6, 10, 13, 23

H.R. Rep. No. 101-485, pt.3 (1990) . . . . . *passim*

H.R. Rep. No. 101-485, pt.4 (1990) 6

S. Rep. No. 101-116 (1989) 4, 6, 10, 13, 23

Other Authorities

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has fought to give meaning to the concept of the "equal protection of the laws" enshrined in the Fourteenth Amendment for members of racial, ethnic, and religious minorities, for women, and for persons with disabilities. The ACLU has vigorously supported the enactment and enforcement of the major federal civil rights statutes that are designed to end discrimination in employment including, in particular, the Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990). Because the decision below threatens to limit substantially the protections afforded by that legislation, this case involves issues of critical importance to the ACLU and its members.[2]

STATEMENT OF THE CASE

Petitioners Karen Sutton and Kimberly Hinton are twin sisters who applied for commercial airline pilot positions with respondent United Air Lines, Inc. (United). United re-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Rather than burdening the Court with multiple briefs, *amicus* respectfully requests that the Court consider the arguments presented herein in connection with its consideration of the related cases of *Murphy v. United Parcel Service, Inc.*, No. 97-1992, and *Albertson's, Inc. v. Kirkingburg*, No. 98-591.

jected their applications because each of the sisters has uncorrected vision that is worse than 20/100 in each eye. The sisters' corrected vision is 20/20 in both eyes.

Petitioners sued United for employment discrimination under the ADA. They alleged that their uncorrected vision is a disability and that, with corrective eyeglasses or contact lenses, they are qualified to serve as commercial pilots. Therefore, petitioners contended that United's policy of refusing to hire pilots with uncorrected vision worse than 20/100 constituted unlawful discrimination against persons with disabilities.

Neither the district court nor the court of appeals ever considered whether, with corrective lenses, the sisters are qualified to be airline pilots or whether United's policy is justified. Instead, both courts ruled that the petitioners are not "individuals with a disability" who can invoke the ADA. First, both courts ruled that the petitioners do not have a physical impairment that substantially limits a major life activity because their vision has been corrected. Second, both courts ruled that United did not regard the sisters as disabled; it simply viewed them as lacking a requirement of the pilot positions they sought. Petitioners sought review in this Court.

SUMMARY OF ARGUMENT

Congress enacted the ADA to provide a comprehensive national mandate for the elimination of discrimination against persons with disabilities, including employment discrimination. To effectuate this goal, Congress adopted a broad definition of "disability" in the ADA. Congress took this definition of disability directly from the definition of "handicapped individual" in the Rehabilitation Act, 29 U.S.C. §794, which Congress knew had been interpreted broadly, and instructed courts to interpret the ADA at least

as broadly. As this case demonstrates, a narrow reading of the ADA's definition of disability would frustrate the purposes of the Act by effectively precluding courts from ever reaching the critical inquiry under the Act: whether the plaintiff is qualified, with or without reasonable accommodation, to perform the essential functions of the job.

Under the first prong of the ADA's definition of disability, the question of whether a plaintiff's physical or mental impairment substantially limits a major life activity must be determined without regard to mitigating or corrective measures. This reading of the statute is required by the clear legislative history of the ADA, uniform regulatory guidance from the administrative agencies charged with enforcement of the Act, and the virtually unanimous weight of appellate authority. Most importantly, consideration of mitigating measures in the determination of disability is logically inconsistent with the underlying purpose and structure of the ADA itself. It would create an absurd result if the corrective measures that often make individuals with disabilities qualified for jobs could be used to exclude them from coverage under the ADA in the first place.

For similar reasons, under the third prong of the ADA's definition of disability, an employer who takes an adverse employment action against a person because of a physical or mental impairment necessarily regards that person as substantially limited in working and hence as disabled for purposes of the Act. Again, the clear legislative history of the ADA and its interpretation by regulatory agencies, along with this Court's interpretation of an identical provision in the Rehabilitation Act, *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), provide strong support for this reading of the "regarded as" prong of the ADA. A number of lower courts, including the court below, have adopted an unduly narrow construction of this third prong by taking the narrow "class of jobs" exception that applies to the first

prong of the definition and misapplying that exception to the third prong. This Court should correct that misunderstanding and clarify that a person denied employment because of an impairment has necessarily been regarded as disabled.

ARGUMENT

I. THE ADA WAS INTENDED TO BROADLY PROTECT QUALIFIED PERSONS WITH PHYSICAL AND MENTAL IMPAIRMENTS FROM DISCRIMINATION IN EMPLOYMENT

A. Congress, In Enacting The ADA, Sought To Provide Broad Protection Against Employment Discrimination For Persons With Disabilities

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. §12101(b)(1), and "to bring persons with disabilities into the economic and social mainstream of American life . . . ." S. Rep. No. 101-116, at 2 (1989); H.R. Rep. No. 101-485, pt.2, at 22 (1990). Congress recognized, after extensive legislative hearings, that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing," 42 U.S.C. §12101(a)(1), and that discrimination against persons with disabilities was a pervasive, societal problem.

Congress was particularly concerned about employment discrimination against individuals with disabilities based on fears, myths, and stereotypes about their conditions. Congress noted that two-thirds of all working-age Americans with disabilities were unemployed, S. Rep. No. 101-116, at 9; H.R. Rep. No. 101-485, pt.2, at 32, and concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice . . . costs the United States billions of

dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. §12101(a)(9).

Thus, when Congress passed the ADA by overwhelming majorities in both houses,[3] it understood that it was enacting "comprehensive" remedial legislation against discrimination based on disability. *See Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1233 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3433 (Jan. 8, 1999)("The Act was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination -- it was not drafted narrowly to protect only those with the most severe disabilities"). Courts construing the ADA, and in particular its definition of "disability," 42 U.S.C. §12102(2), must be guided by this broad congressional purpose. *Cf. Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998)("Conceptually, it seems more consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination.").

B. Congress Adopted The ADA's Definition Of Disability From Title V Of The Rehabilitation Act, Which Had Been Interpreted Expansively

The ADA defines "disability" in 42 U.S.C. §12102(2):

> The term "disability" means, with respect to an individual --
> (A) a physical or mental impairment that substantially limits one or more of the major life

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[3] The votes on final passage of the ADA were 377-28 in the House of Representatives and 91-6 in the Senate. 136 Cong.Rec. H4629-30 (daily ed. July 12, 1990); 136 Cong.Rec. S9695 (daily ed. July 13, 1990).

activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

As this Court has recognized, this definition of disability "is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973, and the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988." *Bragdon v. Abbott*, 524 U.S. __, __, 118 S.Ct. 2196, 2202 (1998)(citations omitted); *see also* S. Rep. No. 101-116, at 21; H.R. Rep. No. 101-485, pt.2, at 50; H.R. Rep. No. 101-485, pt.3, at 27.[4] Normally, "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon*, 118 S.Ct. at 2202. As this Court observed, the Congress went further in the ADA to drive this point home:

> In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows:
>
> "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. §12201(a).

[4] The change in terminology from "handicap" to "disability" represented an effort by Congress to utilize "up-to-date, currently accepted terminology." As each of the committee reports explained: "No change in definition or substance is intended nor should be attributed to this change in phraseology." S. Rep. No. 101-116, at 21; H.R. Rep. No. 101-485, pt.2, at 51; H.R. Rep. No. 101-485, pt.4, at 36.

> The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.

118 S.Ct. at 2202.

In cases decided under Section 504 of the Rehabilitation Act (Section 504) prior to the enactment of the ADA, the term "handicapped individual" was applied very broadly to persons with a wide variety of physical and mental impairments.[5] When deciding cases under Section 504, moreover,

[5] *Doherty v. Southern College of Optometry*, 659 F.Supp. 662 (W.D. Tenn. 1987)(retinitis pigmentosa); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977)(vision in only one eye); *Strathie v. Dep't of Transp.*, 547 F.Supp. 1367 (E.D.Pa. 1982)(impaired hearing and use of hearing aids); *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983)(depressive neurosis); *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985)(manic depressive syndrome); *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987)(epilepsy); *Wolff v. South Colonie Cent. School Dist.*, 534 F.Supp. 758 (N.D.N.Y. 1982)(congenital limb deficiency); *Pushkin v. University of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); *Bolthouse v. Continental Wingate Co.*, 656 F.Supp. 620 (W.D.Mich. 1987)(cerebral palsy); *Daubert v. United States Postal Service*, 733 F.2d 1367 (10th Cir. 1984)(degenerative spinal condition); *Dancy v. Kline*, 639 F.Supp. 1076 (N.D.Ill. 1986)(chronic lower back syndrome with disc disease); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981)(limited mobility of arm and shoulder); *Coley v. Secretary of Army*, 689 F.Supp. 519 (D.Md. 1987)(osteoarthritis in hip); *Ward v. Mass. Bay Transp. Auth.*, 550 F.Supp. 1310 (D.Mass. 1982)(artificial leg); *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983)(learning disabilities); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982)(diabetes); *Bailey v. Tisch*, 683 F.Supp. 652 (S.D. Ohio 1988)(heart disease); *Ackerman v. Western Elec. Co.*, 643 F.Supp. 836 (N.D.Cal. 1986)(asthma); *Poole v. South Plainfield Bd. of Educ.*, 490 F.Supp 948 (D.N.J. 1980)(absence of kidney); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979)(hepatitis B carrier); *Ross v. Beaumont Hosp.*, 687 F.Supp. 1115 (E.D.Mich. 1988)

(continued...)

courts tended to accept readily that a plaintiff was a member of a protected class, *i.e.*, a handicapped person, and would then move on to the merits of the case. As one district court noted: "Very few cases spend much time on this issue [of who is a handicapped individual], as the issue usually requires little analysis." *Tudyman v. United Airlines*, 608 F. Supp. 739, 744 (C.D.Cal. 1984).[6] This Court itself recognized, prior to the enactment of the ADA, that the definition of "handicapped individual" in the Rehabilitation Act was "broad." *School Bd. of Nassau County v. Arline*, 480 U.S. at 285.

By drawing the definition of "disability" in the ADA from the Rehabilitation Act, and by enacting the construction rule in 42 U.S.C. §12201(a), Congress clearly expressed its intent that the class of people protected by the ADA should be at least as sweeping as those who were found to have been covered under Section 504. Courts construing the ADA's definition of disability must respect this legislative judgment.

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[5] (...continued)
(narcolepsy); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986) (birth defects); *Fynes v. Weinberger*, 677 F.Supp. 315 (E.D.Pa. 1985) (asbestosis); *Kling v. County of L.A.*, 633 F.2d 876 (9th Cir. 1980) (Crohn's disease). These examples are taken from Robert L. Burgdorf, Jr., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 137-40 (1995).

[6] *Tudyman* itself represents a small class of cases that proved to be an exception to this rule. These were cases in which courts concluded that plaintiffs did not have a real *impairment* at all, but simply had unusual physical characteristics. *See, e.g., Tudyman*, 608 F.Supp. at 745-46 (muscular build is not an impairment); *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986)(left-handedness is not an impairment); *Steven v. Stubbs*, 576 F.Supp. 1409 (N.D.Ga. 1983)(temporary illness with no permanent effect on plaintiff's health is not an impairment). In this case, there is no dispute that, absent corrective measures, petitioners have an impairment that substantially limits the life activity of seeing.

C. The Critical Issue Under the ADA Is Whether The Plaintiff Is Qualified To Perform The Essential Functions Of The Job; Courts That Construe The ADA's Definition Of Disability Too Narrowly Never Reach This Critical Inquiry

It is important to stress that the determination whether an ADA plaintiff has a disability is the beginning, not the end, of the legal analysis of an ADA employment claim. Title I of the ADA prohibits discrimination "against a *qualified* individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a) (emphasis added). The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* at §12111(8).[7]

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[7] A "reasonable accommodation" is a modification to policies or practices or to physical surroundings, or the use of an assistive device or individual (such as a sign language interpreter or reader), that enables a person with a disability to fully perform the functions of a job. 42 U.S.C. §12111(9)(A) & (B). The "reasonable" component of "reasonable accommodation" does not refer to financial feasibility, but rather to whether the modification or acquisition will be reasonably *effective* in allowing the person with the disability to perform the job. Financial and practical costs are reflected instead in the "undue hardship" defense available to employers: an employer is not required to make a reasonable accommodation if doing so would impose an "undue hardship" on the business. 42 U.S.C. §12112(b)(5). *See generally* Feldblum, "The (R)evolution of Physical Disability Anti-Discrimination Law: 1976-1996," Mental and Physical Disability Law Rep. 613 (Sept.-Oct. 1996).

Congress was quite clear that the ADA protects only qualified workers. As the Senate Report explained:

> By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose o[r] effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

S. Rep. No. 101-116, at 26; *see also* H.R. Rep. No. 101-485, pt.2, at 55 (same). The report from the House Judiciary Committee was perhaps even more blunt:

> The underlying premise of [Title I of the ADA] is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure skills required by the job is a critical protection, because stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive.

H.R. Rep. No. 101-485, pt.3, at 31. Thus, before a plaintiff with a disability can prevail on an ADA employment claim, she will have to establish both that she was discriminated against because of her disability and also that, with or without reasonable accommodation, she is qualified for the job. *Cf. Kirkingburg v. Albertson's, Inc.*, 143 F.3d at 1233.

Like the ADA's definition of disability, this multi-step analysis and focus on qualification was taken directly from the Rehabilitation Act. As this Court explained in *Arline*, "The Act is carefully structured to replace . . . reflexive re-

actions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief." 480 U.S. at 284-85 (emphasis in original). "'[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.'" *Id.* at 287 n.17 (quoting 45 C.F.R. pt.84, App.A, p.315 (1985)).

Unfortunately, if a court defines disability in an impermissibly narrow manner and improperly concludes that an ADA plaintiff is not a person with a disability, the case will never reach these critical questions of qualification, reasonable accommodation, and undue hardship. In such a case, the plaintiff will be denied relief even if the defendant employer does not dispute that the plaintiff has a physical or mental impairment, that the defendant took an adverse employment action because of that impairment, and that the plaintiff can perform the essential functions of the job. As the First Circuit explained in *Arnold*:

> Arnold's diabetes makes him just the type of person the ADA was designed to protect . . . . Yet under UPS's and the district court's interpretation of the ADA, a person in this archetypal situation is not protected from discrimination by the ADA because he is not disabled and hence not even a proper plaintiff under the Act. According to UPS, in such circumstances, the trier of fact never gets to the merits of the alleged discrimination, of the 'qualified individual' requirement, or of reasonable accommodation.

136 F.3d at 862.[8]

Thus, for this reason as well, a broad construction of the definition of disability is essential to give effect to the ADA's remedial scheme. With this understanding in place, we now turn our attention to the two particular statutory interpretation questions before the Court.

II. UNDER THE ADA, WHETHER A PHYSICAL OR MENTAL IMPAIRMENT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY MUST BE DETERMINED WITHOUT REGARD TO MITIGATING OR CORRECTIVE MEASURES

Petitioners Karen Sutton and Kimberly Hinton contend that they are persons with disabilities under the first prong of the ADA's definition of disability because their poor eyesight is a physical impairment that substantially limits them in the major life activity of seeing. The court below agreed that their poor vision was "a physical impairment within the meaning of the ADA." 130 F.3d at 900. The Tenth Circuit nevertheless concluded that the petitioners were not substantially limited in seeing because their eyesight had been corrected through the use of eyeglasses or contact lenses; in the court of appeals' view, "[t]he determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." *Id.* at 902.

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[8] *Cf. Arline*, 480 U.S. at 285 (exclusion of all persons with actual or perceived contagious diseases "would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent").

The Tenth Circuit's decision to consider mitigating measures in the determination of disability is erroneous and must be reversed. It is flatly inconsistent with the clear legislative history of the ADA, uniform regulatory guidance from the administrative agencies charged with enforcement of the statute, and the virtually unanimous weight of appellate authority from its sister circuits. Most importantly, consideration of mitigating measures is logically inconsistent with the underlying purpose and structure of the ADA itself.

Although the statutory text is silent on the question, the legislative history of the ADA is replete with explicit references to Congress' clear intention that a person's disability should be determined without regard to mitigating or corrective measures. The Senate Report states:

> A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people . . . . Moreover, whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.

S. Rep. No. 101-116, at 23. The report from the House Education and Labor Committee repeats this guidance virtually verbatim, then adds: "Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication." H.R. Rep. No. 101-485, pt.2, at 52. Finally, the report from the House Judiciary Committee makes the point in a slightly different manner: "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable ac-

commodations, would result in a less-than-substantial limitation." H.R. Rep. No. 101-485, pt.3, at 28. Thus, there can be no question that Congress understood that a corrected disability was still a disability under the ADA.

The agencies charged with responsibility to enforce the ADA followed this express intent of Congress in promulgating regulations and interpretive guidance under the statute. The Equal Employment Opportunity Commission (EEOC), the agency responsible for issuing regulations under Title I, 42 U.S.C. §12116, adopted extensive Interpretive Guidance in conjunction with its regulations.[9] *See* 29 C.F.R. pt.1630, Appendix. The interpretive guidance to the regulation defining the term "substantially limits," 29 C.F.R. §1630.2 (j), provides, in relevant part: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt.1630, App., p.348. In the section-by-section analysis that accompanied the publication of its final regulations, the EEOC explained that it had revised the interpretive guidance to make this point clear, in response to comments received on the proposed guidance from "disability rights groups, which were concerned that the [proposed] discussion could be misconstrued to exclude from ADA coverage . . . individuals with disabilities who function well because of assistive devices or other mitigating measures." 56 Fed.Reg. at 35,728.

The regulations issued by the Department of Justice to implement Titles II and III of the ADA reach the same conclusion. 28 C.F.R. §35.104 and 28 C.F.R. §36.104 contain regulatory definitions of "disability." The accompanying

[9] The proposed version of this Interpretive Guidance was itself published for public comment and revised in accordance with the comments received, just like the underlying regulations. 56 Fed.Reg. 35,726 (1991).

analysis prepared by the Justice Department provides:

> The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

28 C.F.R. pt.35, App.A, p.442 (1998); 28 C.F.R. pt.36, App.B, p.583 (1998).

The court of appeals rejected the EEOC's interpretive guidance on this issue, 130 F.3d at 902, and held that it was not subject to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). 130 F.3d at 899 n.3. But, as this Court explained in *Bragdon*, the views of agencies charged by Congress with responsibility for issuing implementing regulations, rendering technical assistance, and enforcing the ADA "are entitled to deference." *Bragdon*, 118 S.Ct. at 2209 (relying on both Justice Department regulations and accompanying analysis). This is especially true in this case where the statutory text does not explicitly address the question of mitigating measures, *Chevron*, 467 U.S. at 844, and, where, as here, there has been a consistent course of agency interpretation by every agency charged with ADA responsibilities. *Bragdon*, 118 S.Ct. at 2207.

In addition to Congress, the EEOC, and the Department

of Justice, virtually every court of appeals other than the Tenth Circuit to consider the question has concluded that the determination of disability under the ADA must be made without regard to mitigating measures. *See, e.g., Arnold v. UPS*, 136 F.3d 854; *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1349 (1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *cf. Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998)(following EEOC guidelines and legislative history, but construing them narrowly). *But see Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997). This consistent pattern of appellate precedent lends further support to the conclusion that the Tenth Circuit's ruling is in error.

The court below concluded that the EEOC's Interpretive Guidance concerning mitigating measures was "in direct conflict with the plain language of the ADA" because, with their corrective lenses, the petitioners were not "substantially limit[ed]" in seeing. 130 F.3d at 902. This position, however, "confuses the disease with its treatment." *Matczak*, 136 F.3d at 937. The petitioners' poor eyesight does substantially limit their major life activity of seeing; their eyeglasses and contact lenses simply correct that limitation.[10]

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[10] The assumption that the EEOC's guidance directly conflicts with the plain language of the ADA was expressly rejected by the Eleventh Circuit in *Harris*:

> [T]here is no direct conflict between the interpretation
>
> (continued...)

Finally, and perhaps most importantly, the Tenth Circuit's approach is logically inconsistent with the purpose and structure of the ADA. The court of appeals concluded its discussion of the mitigating measures issue with the suggestion that the petitioners were trying to have their cake and eat it too:

> Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major li[f]e activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing.

130 F.3d at 903.

But it is the lower court's analysis that is logically flawed. It "conflates two separate parts of the ADA": the threshold determination of whether a person is disabled and the subsequent determination of whether such a person has been discriminated against in connection with an employment position for which she is qualified. *See Arnold v. UPS*, 136 F.3d at 863. Under the Tenth Circuit's misinterpretation of the statute, an employer can blithely discriminate against a qualified individual with a correctable or mit-

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[10] (...continued)

> contained in the appendix to the regulations and the statute itself. There is nothing inherently illogical about determining the existence of a substantial limitation without regard to mitigating measures such as medicines or assistive or prosthetic devices, and there is nothing in the language of the statute itself that rules out that approach.

102 F.3d at 521.

igable disability without fear of ADA liability because the target of the discrimination would be unable to invoke the ADA's protections. *Id.* at 862.

Under the proper, logical ADA analysis, a court first determines whether a person's physical or mental impairment substantially limits that person in some major life activity. Because this first step of the analysis is designed simply to determine whether the individual has the type of serious medical condition contemplated by Congress, courts should make that determination without regard to any corrective devices or mitigating measures.

In the second step of the analysis, a court must determine whether an individual who has a serious medical condition is nonetheless still qualified to perform the job in question. At that stage, corrective devices or measures used by the individual might well be critical. Indeed, it is often by using such corrective measures that people with serious medical conditions become qualified for employment. As examples, a person with diabetes who takes insulin, a person with epilepsy who takes anti-seizure medication, a person without a leg who uses a prothesis, and a person with serious myopia who uses glasses may all ultimately be qualified for the jobs they seek, despite the fact that they have serious medical impairments.

It would create an absurd "Catch-22," however, if the very corrective measures that make these individuals with disabilities qualified for jobs also serve to exclude them from coverage under the ADA in the first place. Under such a misguided reading of the ADA, the majority of individuals with serious medical conditions who would remain covered would likely also be the ones not qualified for the jobs they seek. Congress could not have intended such an

absurd result.[11] Rather, it is precisely persons such as petitioners -- *i.e.*, those with disabilities that do not preclude them from working -- for whom Congress enacted Title I of the ADA in order to unlock the doors to gainful employment.[12]

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[11] The fallacy in the Tenth Circuit's reasoning is demonstrated by a hypothetical posed by the First Circuit in *Arnold*. Under the Tenth Circuit's interpretation, "someone who could not afford treatment for his impairment would be protected by the ADA from discrimination in hiring. But once he was hired and obtained treatment under the employer's health plan, he would lose the ADA's protection because he would no longer be 'disabled.' The employer could then fire him on the basis of his disability without fear of the protective consequences embodied in the ADA." 136 F.3d at 862.

[12] The fact that this analysis would bring numerous people in this country who have significantly impaired eyesight and wear corrective lenses within the coverage of the ADA should not be a cause for concern. Most civil rights laws cover a vast number of people. For example, Title VII of the Civil Rights Act of 1964 covers every single person in this country because everyone has a race and a gender. Nevertheless, most white people and most men (and, for that matter, many women and minorities) do not experience the type of job discrimination that requires them to invoke the protection of Title VII. Similarly, while the ADA covers a large number of people with corrective lenses, the vast majority of such individuals will never encounter the type of job discrimination that would require them to invoke the protection of the Act.

III. AN EMPLOYER WHO TAKES AN ADVERSE EMPLOYMENT ACTION AGAINST A PERSON BECAUSE OF A PHYSICAL OR MENTAL IMPAIRMENT NECESSARILY REGARDS THAT PERSON AS SUBSTANTIALLY LIMITED IN WORKING AND HENCE AS DISABLED FOR PURPOSES OF THE ADA

Even if a person does not have an actual physical or mental impairment that substantially limits a major life activity, or has a relatively nonserious physical or mental impairment that does not in practice limit any major life activity, she may nevertheless qualify as an individual with a disability for purposes of the ADA if she is "regarded as having such an impairment." 42 U.S.C. §12102(2)(C). The EEOC regulations define this term to mean:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (3) [Does not have a physical or mental impairment as defined in the regulations] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. §1630.2(l). According to the court below, petitioners did not satisfy the third prong of the ADA's definition of disability because United did not regard them as substantially limited in the major life activity of working; it merely viewed them as unable to perform the requirements of its pilot position. 130 F.3d at 905.

The Tenth Circuit's understanding of the "regarded as" prong of the definition of disability is inconsistent with congressional intent in establishing this third prong of the definition, with the EEOC's regulatory guidance concerning the "regarded as" prong, and with this Court's explication of an identical provision under Section 504. Under a proper interpretation of the third prong, the determination that United considers the petitioners unfit to be pilots because of their eyesight satisfies the statutory requirement that United "regards" them as substantially limited in working and therefore as persons with disabilities under the Act. In fact, any employer who takes an adverse employment action against a person *because of* a physical or mental impairment necessarily regards that person as substantially limited in the life activity of working and hence as a person with a disability. As the EEOC's Interpretive Guidance explains:

> [I]f an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear, or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear, or stereotype" can be drawn.

See 29 C.F.R. pt.1630, App., p.350.

This Court in *Arline*, interpreting an identical provision under Section 504, articulated the following rationale for the "regarded as" prong:

> [T]he basic purpose of §504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By

> amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 282-84 (footnotes omitted).

In response to an assertion by the Solicitor General at oral argument that such an interpretation of the third prong would be a "totally circular argument which lifts itself by its bootstraps,"[13] *id.* at 283 n.10, this Court respectfully disagreed. It pointed out that:

> The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work.

Id.[14]

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[13] The perceived circularity of the interpretation stems from the fact that it is the defendant's allegedly discriminatory act (such as a failure to hire or the decision to fire) that gives rise to the plaintiff's coverage under the Act.

[14] In a previous footnote, this Court noted that the legislative history to Section 504 reflected "Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others . . . ." 480 U.S. at 282 n.9. The Department of Justice subsequently observed that "the [Supreme Court] relied on legislative history which does indicate that at least some Members of Congress believed that the perception of a physical disability by others does not have to include the belief that the perceived condition results in a limitation of major life activities, but

(continued...)

When Congress included the third prong of the definition of disability in the ADA, it relied heavily on this Court's explication of that prong as set forth in *Arline*. For example, the Senate Report described, in some detail, this Court's analysis in *Arline* and then concluded:

> A person who is excluded from *any* activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, . . . if an employer refuses to hire someone . . . because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.

S. Rep. No. 101-116, at 24 (citations omitted)(emphasis added); *see also* H.R. Rep. No. 101-485, pt.2, at 53 (same); H.R. Rep. No. 101-485, pt.3, at 30 (to the same effect).[15]

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[14] (...continued)
simply that the perception of the condition by others in itself has that effect." Memorandum from Douglas W. Kmiec, Acting Ass't Att'y Gen., Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in* 8 Fair Empl. Prac. Cases (BNA) No. 641 at 405:8, n.14 (discussing footnote 9 in *Arline*).

[15] The House Judiciary Committee elaborated further:

> Sociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation, and accessibility, and acceptance by co-workers and customers . . . . This list of frequent workplace concerns is not exhaustive. It illustrates, however, the attitudinal barriers that Congress clearly intended to include within the meaning of "regarded as" having a disa-

(continued...)

The EEOC's Interpretive Guidance to its implementing regulations closely tracks this legislative history. *See* 29 C.F.R., pt.1630, App., p.350.

Both Congress and the implementing agency were thus quite clear: when a person is denied a position based on an actual or perceived physical or mental condition, the offending employer has regarded that individual as substantially limited in working, and hence as a person with a disability under the "regarded as" prong of the definition. Such an individual is then entitled to invoke the protection of the ADA.

Despite this clear legislative history and regulatory guidance, a significant number of courts, like the court below, have adopted an unduly narrow construction of the third prong of the definition of disability and have thereby prevented plaintiffs from pursuing their claims. Courts that have reached this result have done so by taking a narrow exception that applies to the *first* prong of the definition, and misapplying that exception to the *third* prong of the definition of disability.[16]

Under the first prong of the definition of disability, an individual is substantially limited in the major life activity of working if she is

> significantly restricted in the ability to perform

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[15] (...continued)
bility under the Rehabilitation Act, and now under the ADA.

H.R. Rep. No. 101-485, pt.3, at 30.

[16] *See, e.g., Ryan v. Grae & Rybicki*, 135 F.3d 867, 872 (2d Cir. 1998); *Deas v. River West, L.P.*, 152 F.3d 471, 481 (5th Cir. 1998); *Skorup v. Modern Door Corp.*, 153 F.3d 512, 515-16 (7th Cir. 1998); *Miller v. City of Springfield*, 146 F.3d 612, 614-15 (8th Cir. 1998); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997); *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998).

> either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. §1630.2(j)(3).[17]

The EEOC guidance explains that this type of analysis should be quite rare in determining whether an individual has a disability under the first prong of the definition. Most individuals with physical or mental impairments will be limited in some major life activity *other* than working. For example, a person with severe arthritis may be limited in lifting and bending, a person with a stroke may be limited

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[17] This analysis with regard to individuals who are unable to perform a "single, particular job" is drawn from the legislative history of the ADA. As the report from the House Judiciary Committee explained:

> A person with an impairment who is discriminated against in employment is also limited in the major life activity of working. However, a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in [t]he major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field in which the painter works.

H.R. Rep. No. 101-485, pt.3, at 29. Even if this analysis were applicable to the present case, which we contend it is not, petitioners should nevertheless have been found to be substantially limited in working. There was nothing unique about the job site or materials used on United's airplanes that precluded pilots with petitioners' impairment. Rather, United considered petitioners' condition disqualifying for the entire "class" of pilot positions.

in walking and talking, and a person with esophageal fungal infections may be limited in eating. Indeed, it should be the exception for any person with a serious medical condition to argue that her impairment substantially limits her in the life activity of working -- particularly since, in the second stage of analysis under the ADA, that individual must also prove she is qualified to work. Thus, as the EEOC guidance explained:

> If an individual is *not* substantially limited *in any other major life activity*, the individual's ability to perform the major life activity of working should be considered. If an individual *is* substantially limited in any other major life activity, *no* determination should be made as to whether the individual is substantially limited in working.

29 C.F.R. pt.1630, App., p.348 (emphasis added).

There are some very rare situations, however, as one of the committee reports observed, in which an impairment is so unique that the *only* limitation it will cause the individual is in that person's work setting. *See* n.17, *supra*. In those rare cases, the EEOC guidance explains that the individual must prove she is precluded from working in a class of jobs or a broad range of jobs, not just a single job for one particular employer. 29 C.F.R. pt.1630, App., p.348.[18]

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[18] A surprising number of courts have either completely misunderstood or ignored the EEOC's regulations in this regard. Under the first prong of the ADA's definition, they have analyzed whether a plaintiff's impairment limits the individual's ability to work, even though the impairments at issue could clearly have been understood as limiting life activities *other* than working. *See, e.g., Olson v. GE Astrospace*, 101 F.3d 947, 952-53 (3d Cir. 1996)(depression, sleep disorder, and multiple personality disorder); *Ellison v. Software Spectrum*, 85 F.3d 187, 191 (5th (continued...)

While this narrow exception that requires an analysis of "class of jobs" or "broad range of jobs" may appropriately be invoked in certain rare situations under the first prong of the definition, it has no place under the third prong of the definition. As the House Judiciary Committee explained, in discussing the "regarded as" prong of the definition of disability:

> Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

H.R. Rep. No. 101-485, pt.3, at 30-31. This same distinction was made in the EEOC Interpretive Guidance to the third prong of the definition of disability. 29 C.F.R. pt. 1630, App., p.350.

This distinction, drawn by the committee reports and the EEOC, makes perfect sense. A plaintiff's argument

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[18] (...continued)
Cir. 1996)(radiation treatment for breast cancer); *Bolton v. Scrivner*, 36 F.3d 939, 944 (10th Cir. 1994)(work-related injury to shoulder and both feet); *Redlich v. The Albany Law School of Union University*, 899 F. Supp. 100, 106-07 (N.D.N.Y. 1995)(impaired use of leg, arm, and hand due to stroke). In most of these cases, the courts rely on the evidence plaintiffs have submitted to demonstrate that they are *qualified* for the jobs in question to rule that the plaintiffs are not substantially limited in working and hence not covered under the ADA in the first place. *But see Homeyer v. Stanley Tuchin Associates*, 91 F.3d 959 (7th Cir. 1996) (correctly rejecting this "Catch-22" for plaintiff with chronic severe allergic rhinitus and sinusitis).

under the third prong of the definition is not that her impairment *actually* limits her in the life activity of working, as might be the case in certain rare situations under the first prong of the definition. Rather, her argument is that she is being *regarded* as limited in working by the defendant. In such circumstances, the plaintiff should logically be able to prove her point simply by establishing that the defendant refused to hire her, or fired her, *because of* her impairment. Whether the defendant felt the plaintiff was capable or not capable of performing any number of other jobs in the economy should be irrelevant to the "regarded as" analysis under the third prong of the definition. Indeed, that issue never even arose in this Court's analysis of the identical third prong in *Arline*.

Finally, the misguided incorporation of first-prong "class of jobs" analysis into the third prong of the ADA's definition yields an irrational and ironic result. Although the "regarded as" prong is logically supposed to turn solely on the perceptions of the employer, the inclusion of a focus on a "class of jobs" has led some lower courts -- as a practical matter -- to also look at how other employers in the same industry treat a particular disability. For example, in this case, the Tenth Circuit explained:

> We are concerned with whether United regards plaintiffs as 'disabled,' not whether the airline industry as a whole regards individuals with uncorrected vision of 20/100 or worse as 'substantially limited' in a major life activity . . . . However, we do examine the airline industry to assist in determining whether Plaintiffs' impairment substantially limits their employment generally in a "class of jobs."

130 F.3d at 905. The result of such an analysis is perverse. If a business has the same standards for exclusion of persons

with disabilities as others in the industry, it would be subject to suit under the ADA because the plaintiff will legitimately have been perceived as being substantially limited in working in a class of jobs.[19] However, if a business has a uniquely discriminatory policy that is not shared by others in the field, that business would be shielded from ADA liability because the plaintiff would not in practice have been excluded from a "class of jobs." Congress could not have intended such an irrational result.

Again, it is important to stress that a determination that an employer fails to hire, or fires, an individual because the employer views that individual's impairment as limiting her in the major life activity of working does not mean that such an individual will prevail in an ADA suit. It means only that the case will proceed to the next question: whether the individual is a qualified person with a disability, *i.e.*, whether she could perform the essential functions of the position with or without reasonable accommodation. In the present case, it is undisputed that United rejected petitioners' applications to become pilots because it regarded their poor vision as rendering them unable to perform that job. This is all that petitioners were required to show in order to establish that they are persons with disabilities under the third prong of the ADA definition.

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[19] Of course, if this view of the impact of the disability on certain jobs is so widely held, it may also be the case that persons with such disabilities are legitimately not qualified for such jobs.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

Louis M. Bograd
(Counsel of Record)
American Civil Liberties Union
Foundation
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 234-1817

Chai R. Feldblum
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9595

Steven R. Shapiro
Matthew A. Coles
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Dated: February 22, 1999

Supreme Court, U.S.
FILED
FEB 22 1999
OFFICE OF THE CLERK

No. 97-1943

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,
Petitioners,
v.
UNITED AIR LINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	5
1. Statutory Structure	8
2. The "Record of Impairment" Definition of "Disability"	12
CONCLUSION	24
APPENDIX OF LEGISLATIVE HISTORY	1a

TABLE OF AUTHORITIES

CASES — Page

Batson v. Kentucky, 479 U.S. 79 (1986) 7
Bragdon v. Abbott, 118 S. Ct. 2196 (1998) 3, 7, 8, 14
Murphy v. United Parcel Service, No. 97-1992..... 23
School Board of Nassau County v. Arline, 480 U.S. 273 (1987) .....*passim*
E.B. Black, Ltd. v. Marshall, 407 F. Supp. 1088 (1980) 13
Sutton v. United Air Iines, 130 F.3d 893 (10th Cir. 1997) 12, 14
Teague v. Lane, 489 U.S. 288 (1989) 7
Western Air Lines v. Criswell, 472 U.S. 400 (1985) 10

STATUTES AND REGULATIONS

29 C.F.R.
§ 1630.2(i) 12
Part 1630, App. § 1630.2(l) 13
§ 1630(k) 15
Part 1680, App. § 1630(k) 16, 17
29 U.S.C. § 794 7
42 U.S.C.
§ 12101 *et seq.* .....*passim*
§ 12102 1
§ 12102(2) 8
§ 12102(2)(A) 7, 12, 13, 14
§ 12102(2)(B) .....*passim*
§ 12102(2)(C) 7
§ 12111(3) 9
§ 12111(8)..... 8
§ 12111(10) 9
§ 12112(a) 5, 9
§ 12112(b)..... 9
§ 12112(b)(5) 9
§ 12113(b) 9
§ 12201(a) 8

MISCELLANEOUS

EEOC, *Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act* (1992) 16

TABLE OF AUTHORITIES—Continued

Page

Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 Harv. L. Rev. 1560 (1998) 10
U.S. Equal Employment Opportunity Commission and U.S. Department of Justice, *Americans with Disabilities Act Handbook* (1991) 9

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

The Tenth Circuit held that the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, generally has no application to individuals (such as the plaintiffs here) who are able to function normally in their daily lives through the use of ameliorative mechanisms (such as, here, eyeglasses) or medications, even where an employer relies on that individual's underlying, uncorrected, disabling medical condition (here, seriously impaired eyesight) as the reason why the individual is not suitable for hire. The ADA defines "disability" to include "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual," as well as "(B) a record of such an impairment" and "(C) being regarded as having such an impairment." 42 U.S.C. § 12102. While the parties, and the Tenth Circuit, have concentrated on subsections (A) and (C) in determining whether the ADA applies to circumstances such as those in this case, it is our submission that subsection (B), the "record of impairment" definition, applies to these circumstances more straightforwardly and with less complexity of analysis and factual development than do the other definitional subsections.

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

1. Unlike other civil rights statutes, the ADA does not set our inflexible prohibitions but, instead, establishes parameters for making employment decisions so that the employer reasonably considers and takes into account any employee disability. In this case, for example, the ADA if it applied would require United to consider and justify its uncorrected vision rule in light of evidence indicating whether the risk that impaired uncorrected eyesight could hamper a pilot with normal corected vision in exigent situations is realistic and, if so, whether there are any prophylactic measures that would eliminate that risk.

The answer to those questions are surely not self-evident, although it is certainly possible that United would be able to establish that, given the extremely high safety standards to which it quite properly aspires, the rule is a proper one under the ADA.

United's position in this case, however, is that Congress in the ADA exempted its uncorrected vision rule entirely from the self-scrutiny that the statute requires. That position, if excepted, would of course exempt from the ADA not only standards such as United, as to which one can perceive a logic if there is evidence to support it and no acceptable reasonable accommodation, but, as well, entirely arbitrary, facially irrational exclusions of normally-functioning individuals with underlying, albeit medically controlled, disabling conditions.

2. The "record of impairment" aspect of the ADA's definition of "disability" is directly applicable here.

(a) There is, we believe, no dispute in this case at this juncture as to whether or not the plaintiffs have an "impairment." The Tenth Circuit so held, recognizing that this aspect of the "disability" definition is directed at consideration on a biological level of the state of the individual's physiological systems. And, that understanding of the "impairment" prong of the definition was con-

firmed by this Court last year in *Bragdon v. Abbott,* 118 S. Ct. 2196, 2202-04 (1998).

(b) The language of the "record of impairment" definition applies here. Individuals who have a medically-diagnosed impairment and who then obtain medical care or advice that results in the prescription of devices, medications, or lifestyle changes to control that impairment ordinarily have a "record of" that impairment in their medical files, and it is ordinarily easily possible, as it is here, to determine whether that impairment is one that necessarily substantially limits a major life activity absent medical intervention.

(c) The Equal Employment Opportunity Commission's (EEOC's) understanding of this "record of impairment" provision confirms that it is applicable to circumstances such as those in this case. The administrative materials confirm, for example, that medical records are among the types of records that suffice; that the subsection applies to present, controlled as well as historical, cured impairments; that the subsection applies whether or not the individual is currently substantially limited in a major life activity; and that the record itself need not show that there was in fact a substantial interference with major life activities, if the impairment is one that necessarily would limit such activities.

(d) Finally, a comparison of the controlled impairment situation presented here with the circumstances and analysis of the only case in this Court applying a "record of impairment" "disability" definition (under a parallel statute), *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987), demonstrates that the "record of impairment" subsection does apply. *Arline* held that an individual with a history of hospitalizations for tuberculosis had a "record of" a substantially limiting impair-

ment, so that her discharge for fear of further contagion was subject to scrutiny under the Rehabilitation Act of 1973.

Both in *Arline* and in circumstances such as those in this case, the individual has at present no functional substantially limiting impairment because of an earlier medical intervention. In both instances, however, the individual has a real, not imagined, history of serious medical impairment, objectively documented, and the employer is relying on that history as the basis for making its employment decision. And, in both instances, the employer's concern is that an apparently cured, dormant or controlled medical situation will reoccur on the job due to failure of the controls or cure, interfering with the employee's work in a significant way.

As *Arline* makes clear, the "record of impairment" definitional provision is intended precisely to subject these medically-driven decisions to the Act's structured inquiry requirements, assuring individuals with such a "record of impairment" that they will not be driven from the workplace on the basis of unexamined assumptions about the possible manifestation in the workplace of a medical impairment that is otherwise controlled or cured.

ARGUMENT

This case arises under the employment title of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, which, broadly speaking, prohibits employer discrimination against persons with disabilities in hiring, assignment, and the like.

The plaintiffs are qualified, licensed commercial pilots who have 20/20 eyesight with their medically prescribed corrective lenses but 20/200 and 20/400 uncorrected eyesight—eyesight so poor that they could not, without corrective lenses, drive a car, watch television, or engage in a myriad of other daily activities.

The defendant is United Airlines, which rejected plaintiffs for employment by reason of its rule that only otherwise qualified individuals with *uncorrected* eyesight of 20/100 or better can be United passenger plane pilots.

United thus distinguishes for employment purposes between pilots with 20/100 eyesight, hiring only those who meet that eyesight test without any medical correction and rejecting those who meet it with a medical correction and whose natural eyesight is impaired.

From this bare bones summary one would think that the question here is the *substantive* ADA question of whether United Airlines can make such a distinction between two pilot applicants, both of whom by hypothesis meet United's eyesight requirement for pilots in operational terms—*viz.*, both of whom test 20/100 in a test of actually operational eyesight—on the express basis that one applicant has an underlying physical impairment.

According to the court of appeals one would be wrong in so thinking. Indeed, according to that court there is *no* such ADA substantive question. That is, said the court of appeals, because the ADA at the *threshold* only protects "individual[s] with a disability" (42 U.S.C. § 12112(a)), and a person whose eyesight is corrected to 20/100 or better is *not* a person with a disability. Thus,

according to the court below, any adverse employment action against such a person expressly based on the person's uncorrected eyesight—even though such eyesight is admittedly a disabling condition unless corrected—is adverse employment action against a person without a disability and is entirely outside the ADA's purview.

Put more generally, on the decision below, the ADA has *no application whatever* to individuals who are able to function normally in their daily lives through the use of ameliorative mechanisms or medications, even where—as here—the employer *relies precisely on that individual's underlying, uncorrected, disabling medical condition* as the reason why the individual is not suitable for hire. In other words, the Tenth Circuit held, and United is arguing in this Court, that Congress meant in a broad range of circumstances to entirely exempt employer decisionmaking concerning whether a particular underlying medical condition should preclude an individual from holding a job from ADA challenges and scrutiny.

It is our submission in this brief that the ADA's coverage is not unnaturally confined so as to put that entire class of cases beyond substantive scrutiny. In more specific terms, we argue here that where the employer's decisionmaking process turns on the proposition that it is the prospective employees' actual, known, recorded, physical condition that is the critical, disqualifying factor precluding their employment Congress specifically provided for coverage under the Act in the subsection of the definition of "disability," which states that "disability" means *"a record of"* a "physical or mental impairment that substantially limits one or more . . . major life activities,"—a subsection of the ADA "disability" definition section that has been heretofore ignored, as far as we are aware, in this litigation.[2]

[2] The narrow focus of this brief is not intended to suggest any disagreement with the positions of the plaintiffs or the United States regarding the application of the two other subsections of the "disability" definition. Rather, we seek to avoid repetition of arguments ably made by others and to present for the Court's consideration what we believe is a most straight forward approach to the issue here, and one unlikely to be otherwise presented. In so doing, we note that our showing that this case is brought within the ADA by § 12102(2)(B) does not mean that it is not as well, brought within the ADA by either or both of the two subsections relied upon by plaintiffs and the United States, § 12102(2)(A) and (C).

So that we are not misunderstood, before turning to our submission we hasten to add that a proper reading of § 12102(B) will not determine whether or not United Airlines' eyesight requirement for pilots is valid or not. Rather, an affirmative answer to the threshold coverage question will only trigger the application of the ADA to the particular situation here. And, that statute, like its predecessor, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, is "carefully structured" so as not to *preclude* employment decisions based upon pertinent medical conditions but rather to require employer decisionmaking regarding the impact of employee medical conditions on their ability to perform job tasks "based on reasoned and medically sound judgments" rather than on "reflexive reactions to actual and perceived handicaps." *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).[3]

We recognize that it is this Court's "practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which [the Court] granted certiorari." *Bragdon v. Abbott*, 118 S. Ct. 2195, 2205 (1998). Nonetheless, that practice is not invariable (*see, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989); *Batson v. Kentucky*, 479 U.S. 79, 84-85 n.4 (1986)) and should not, we would suggest, be applied to preclude a decision on the basis of one of three aspects of a single, integrated definition. And be that as it may, it appears to us to be beyond doubt that it would be useful for the Court to have before it the full panoply of posible applications of the ADA's "disability" definition to this case in considering the question whether the plaintiffs are "disabled" and therefore covered by the Act.

[3] *Arline*, as indicated, was decided under § 504 of the Rehabilitation Act of 1973. The ADA's employment provisions were

To put matters in perspective we begin by considering the role of the definition of "disability" in the ADA's employment provisions as a whole. After providing that background, we go on to demonstrate that while the complex drafting of the ADA as a whole, and of the "disability" definition in particular, can be said to make the first and third subsections of the "disability" definition somewhat ambiguous with regard to medical conditions that are for almost all purposes controlled through medication or medical devices, the language, function, and purposes of the "record of impairment" portion of the definition shows that the subsection straightforwardly encompasses a known medical condition documented in an individual's medical records that would necessarily "substantially limit[] one or more of the major life activities" of the individual absent correction or amelioration.

1. *Statutory Structure*: The ADA defines "disability" for all its purposes, including for the purpose of Title I of the Act, "Employment," as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment. [42 U.S.C. § 12102(2)].

Section 12111(8), in turn, defines a "qualified individual with a disability" for purposes of the ADA employment provisions as "an individual with a disability who,

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closely modeled on those of the Rehabilitation Act, and the ADA directs that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). For that reason, constructions of the Rehabilitation Act are routinely relied upon in ADA cases. *See Bragdon v. Abbott, supra*, 118 S. Ct. at 2202, 2205, 2207-08.

with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," and specifies that in determining what job functions are "essential," "consideration shall be given to the employer's judgment" as well as to a written job description used in advertising or interviewing for the job.

The Act goes on to proscribe discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112 (a) and (b). "Discriminate" is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5). "Undue hardship" in its turn means "an action requiring significant difficulty or expense, when considered in light of a list of many factors, including the cost of the accommodation, the financial resources of the employer, the number of employees, and the composition of the workforce. 42 U.S.C. § 12111(10). Finally, the ADA provides that an employer may establish safety requirements that screen out individuals with disabilities if that requirement eliminates or limits a "direct threat" to the health and/or safety of others, where "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. §§ 12111(3), 12113(b).

As this short summary indicates, "the ADA rules simply establish parameters to guide employers in how to consider, and take into account, the disabling condition involved." U.S. Equal Employment Opportunity Commission and U.S. Department of Justice, *Americans with Disabilities Act Handbook* (1991), at I-1. The Act does so by posing a series of filtering inquiries that rely heavily on "relative standards instead of categorical prohibitions"

(Note, *Toward Reasonable Equity: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 Harv. L. Rev. 1560, 1575 n.104 (1998)), and that are designed to provide a " 'reasonableness' focus" (*id.* at 1572) to the employer's decisionmaking process concerning whether an individual with particular physical or mental attributes can perform a particular job.

More specifically, and using the circumstances of this case as illustrative, assuming for the moment that the plaintiffs have a "disability" and are covered by the statute, United Airlines would first determine whether they are "qualified" employees for the pilot job they seek. Since plaintiffs have all the requisite skills and license requirements, that inquiry would in all probability focus upon United's apparent safety-based concern, embodied in its 20/100 uncorrected vision requirement, that the corrective measures—glasses or contact lenses—could fail at critical moments, leaving the pilot to read instruments and judge conditions in the air and on the ground with impaired vision.

United would begin quite properly, that the safe operation of the airplane, even in emergency situations, is as a general matter an "essential function" of piloting a plane. *Cf. Western Air Lines v. Criswell,* 472 U.S. 400, 418 (1985) (discussing the Federal Aviation Administration's rigorous, safety-based requirements for pilots, including mandatory retirement at age 60). Applying the "essential functions," "reasonable accommodation," and "direct threat "statutory provisions, United would then go on to examine self-critically the additional, more specific assumptions underlying its uncorrected vision rule—*viz.*, that there *is* an unacceptable risk that the corrective lenses of pilots whose uncorrected vision is worse than 20/100 will fail at critical junctures and thereby endanger the passengers and others.

That inquiry might include such considerations as evidence concerning how often, and with what consequences,

the feared failures of corrective lenses have in fact occurred (as to which data should be available because individuals with better than 20/100 uncorrected vision do wear corrective lenses); whether there is any record of accidents or near-accidents due to failed corrective lenses for commercial pilots (such as plaintiffs) who have seriously impaired uncorrected vision but who do fly commuter, cargo, and other planes; whether substitute requirements such as multiple sets of replacement glasses placed in predetermined places in the cockpit would suffice to eliminate that risk; and so on.

The answers to these questions and others like them are not self-evident, and depend upon medical and aviation expertise, data, and careful analysis. And, the ADA does not purport to provide inflexible or unequivocal answers. Rather, the ADA poses these questions for the employer in the first instance and directs that the employer's answers be reviewed in court, if necessary, on a case-by-case, context-specific basis.

United Airline's position in this case is that none of the foregoing is of any legal pertinence. According to United as long as applicants for employment as pilots have normal vision when corrected and therefore are not impeded for most purposes in their daily lives by their severe biological vision impairment, Congress did not intend to require that United engage *at all* in the mode of inquiry outlined above when determining that that severe impairment is a disqualification for employment as a pilot.

To exaggerate that position for illustrative purposes (for we recognize that the actual rule United imposes may prove defensible when scrutinized as the ADA requires), on United's understanding of the statute, a law firm could similarly require specified uncorrected vision as a medical requirement for attorney positions, and the firm in so doing would be wholly outside the ADA's purview.

Yet, unlike an airline with respect to pilot positions, a law firm could not, in all probability, without demonstrating an undue hardship, demand a specified level of *corrected* vision under the ADA for any and all attorney positions, given the availability of readers, computer technology, and other accommodations that make it possible for vision impaired lawyers and judges to perform, and to perform at a high level.

While it is difficult in that light to see what the justification for a law firm *uncorrected* vision rule could be, the very heart of United's position is that Congress did *not* require in the ADA that employers have *any* justification for disadvantaging an individual on the basis of that individual's actual, biological, serious medical impairment, if that impairment is medically corrected to allow normal functioning as a general matter. That position rests on a serious misreading of the ADA's "disability" definition.

2. *The "Record of Impairment" Definition of "Disability"*: The basis for the employer's insistence that Congress had this anomalous intention in enacting the ADA, and for the Tenth Circuit's holding, succinctly stated, is that (1) individuals in plaintiffs' situation are not "disabled" under the § 12102(2)(A) definition because a physical impairment that is corrected to normal for almost any purpose one can imagine does not "*substantially* limit[] one or more of the major life activities of such person" (emphasis supplied); and (2) such individuals are not "being regarded as having such an impairment" because the only "major life activity" implicated by United's uncorrected vision rule is "working" (*see* 29 C.F.C. § 1630.2(i)), and that rule does not suggest that United "regarded" plaintiffs, because of their uncorrected vision, as unqualified for "all pilot positions at all airlines." *Sutton v. United Air Lines*, 130 F.3d 893, 905 (10th Cir. 1997).

We are somewhat perplexed as to why the litigants in the courts below, and the lower courts, viewed this case

through the inherent complexities of subsections (A) and (C) of the "disability" definition section, when, as we now detail, subsection (B) of that definition section, stating that a "disability" is also "a record of" an impairment of the kind defined as a disability in subsection (A)—*viz.*, an impairment that substantially limits a major life activity—both in its plain language and in its underlying purpose brings this case within the ADA's coverage.[4]

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[4] It suffices here to note that subsection (A) raises thorny legal interpretation questions explored at length in the decision below and the parties' submissions. And, as we develop below, a literal reading of the "regarded as impaired" subsection and the applicable negotiations raises conceptual difficulties of some dimension.

Without discussing those difficulties fully, we note that the language of the "regarded as" provision suggests an inquiry into the employer's perceptions and frame of mind. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(1) (interpretive guidance construing the "regarded as" provision as pertaining, *inter alia*, to circumstances in which "[t]he individual [has] . . . an impairment which is not substantially limiting [of a major life activity] but *is perceived* by the employer . . . as constituting a substantially limiting impairment") (emphasis supplied). Yet, as the interpretive guidance just quoted indicates, that language can also be read to incorporate on the perceptual level the *whole* of the "substantially limit" provision of § 12102(2)(A), thereby necessitating an understanding of what the employer *thought* about the employee's or prospective employee's overall work prospects, and not only what the employer thought about the prospective employee's suitability for employment by that particular employer or what the employee's *actual* work prospects were given the *actual* employment practices of other employees. *See E.B. Black, Ltd. v. Marshall*, 407 F. Supp. 1088, 1099-1101 (1980) (opinion treating as an original proposition with the interpretive difficulties posed under the parallel language of the Rehabilitation Act of 1973 with regard to determining the range of jobs for which an employer "regards" an employee as disqualified and whether that range of jobs is sufficiently broad to demonstrate that the employer "regards" the employee as disabled from the major life activity of working).

As we noted at the outset (n.2, *supra*), we in no way disagree with the plaintiffs' position concerning the application of the "regarded as" provision to this case. Our point is simply that the application of that provision entails certain complexities, both analytically and factually, and that in a broad range of cases those

(a) At the outset, we do not understand there to be any dispute in this case at present as to whether the plaintiffs' have "a physical or mental impairment." The Tenth Circuit recognized that they do, because "[i]f the underlying disorder or condition makes worse or diminishes in a material respect any of the enumerated [in 29 C.F.R. § 1630(h)] body systems of the individual, then it should be considered an "impairment," regardless of whether the individual compensates for this worsening or diminishment by corrective measures." *Sutton v. United Air Lines, supra*, 130 F.3d at 898-99. This analysis of what constitutes an "impairment" was later confirmed by this Court in *Bragdon v. Abbott, supra. See* 118 S. Ct. at 2202-04 (concluding that asymptomatic HIV infection is an "impairment" because of the detrimental biological changes caused by the infection, and considering the functional impact of those biological effects only with regard to the separate inquiry whether the "impairment" affects a major life activity).

(b) On a purely linguistic level, individuals who have a medically-diagnosed impairment and who then obtain medical care or advice that results in the prescription of devices, medications, or lifestyle changes (or more than one of those forms of intervention) that mitigate the functional effects of that impairment necessarily have a "record of" that impairment in their medical files. That "record" will ordinarily be sufficient to determine whether or not the recorded untreated impairment is one that "substantially limits one or more of the major life activities" (§ 12102(2)(A)) of the individual. From the medical records of an epileptic or a diabetic, for example, one would be able to determine whether the impairment at the biological level is one that, left untreated, would have a substantial negative effect on the patent's daily life activities—as vision impairment of the kind suffered by the plaintiffs here surely would.

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complexities do not arise under the "record of impairment" definition of disability.

(c) The Equal Employment Opportunity Commission (EEOC)'s regulations and interpretive guidance confirm the applicability of the "record of impairment" subsection of the ADA disability definition to situations, such as this one, where the employer is relying upon a known, actual—but ordinarily controlled—substantially limiting impairment as the basis for disadvantaging an individual.

The pertinent EEOC regulation reads in its entirety:

> *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. [29 C.F.R. § 1630.2(k) (emphasis added).]

The pertinent EEOC interpretive guidance adds:

> The second part of the definition [of disability] provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that *erroneous classification.* [cites to legislative history]
>
> *This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.* There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records. [29

C.F.R. Part 1630, App. § 1630(k) (emphasis added).][5]

Finally, the EEOC's Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act (1992) provides further guidance, including the following:

> This part of the definition protects people who have a history of a disability from discrimination, whether or not they currently are substantially limited in a major life activity.
>
> *For example*: It protects people with a history of cancer, heart disease, or other debilitating illness, whose illnesses are either cured, *controlled* or in remission. . . . [*Id.* at II-8 (emphasis added).]

The EEOC administrative materials, then, taken together, confirm that the "record of impairment" aspect of the statutory "disability" definition applies here.

These analyses, first, make explicit the seemingly self-evident proposition that the record relied upon can include medical records.

Further, the EEOC's understanding of the statute is that a relevant record need not indicate any *current* actual or perceived substantial limitation on a major life activity, and may document *either* a history of an impairment *or* a present impairment. According to the enforcing agency, 'this part of the definition is satisfied if a record relied on by an employer indicates that the individual *has or has had* a substantially limiting impair-

[5] There is one additional paragraph in the EEOC's Interpretive Guidance that discusses the relevance of records concerning eligibility for veteran's, retirement, or other benefits; that paragraph is not here pertinent.

The administrative materials quoted in the text closely track the available ADA legislative history, and we do not believe that that history adds anything of interpretive utility. For completeness, however, we set out the pertinent language of the committee reports in the Appendix to this brief.

ment." 29 C.F.R. Part 1630, App. § 1630(k); *see also id.* (explaining that an individual currently misclassified in records is covered).

Additionally, the EEOC construes the "record" subsection, consistently with its language, as providing that the record itself need not reflect that the individual has in fact suffered a substantial effect on major life activities. Thus, an entirely *erroneous* record of an impairment suffices (such as an erroneous record that an individual has a learning disability), as does a record of an impairment that "*would* substantially limit one or more of the individual's major life activities" (29 C.F.R. Part 1630 App. § 1630(k), emphasis supplied).[6]

[6] One can, in any event, quite sensibly characterize an individual with a controlled impairment that would be substantially limiting if uncontrolled as having a history of a substantial limitation. For it is almost surely true that the individual suffered the impairment uncorrected for at least some period in the past; children usually obtain corrective lenses, for example, only after they cannot read the blackboard or it otherwise becomes evident to them that they are having vision problems in their daily lives.

And, in any event, no reason appears why Congress would distinguish between situations in which an individual's underlying, potentially substantially limiting impairment is diagnosed and recorded before rather than after suffering the debilitation that the impairment is capable of causing if left uncontrolled. There would be no basis, for example, for treating differently for purposes of the "record of impairment" definition an individual diagnosed with diabetes on the basis of blood tests, before suffering a diabetic coma or any other debilitating symptoms, and one for whom the diagnosis was made only after she suffered such symptoms. The two individuals' later underlying conditions, after medical and diabetic interventions, and their medical diagnoses in their medical records could well be identical. Employers, moreover, could well have as much basis in the one case as in the other to consider the individual's medical history in deciding on their suitability for a job. To require that such consideration be subjected to the careful self-scrutiny required by the ADA in the one instance and not in the other makes no sense, and there is no evidence that Congress intended any such senseless result.

Similarly, the repeated reference in the administrative materials and in the legislative history (*see* Appendix) to bringing individ-

And, the EEOC specifically construes the "record" subsection to cover "controlled" illnesses or impairments, indicating once more that the underlying impairment can be continuing, and that it is the usual untreated impact of the recorded impairment on major life activities, not the current functioning of the individual, that matters.

(d) Finally, the purposes served by the "record of impairment" aspect of the statutory definition of "disability," as those purposes are described and implemented in the only case of this Court addressing the issue, *School Board of Nassau County v. Arline, supra,* pushes toward the conclusion that that subsection provides for ADA coverage where employers rely on known, potentially debilitating, demonstrable biological conditions, even if those conditions have no significant present effect on an individual's usual daily activities.

Arline concerned a teacher who had been diagnosed with tuberculosis and hospitalized with the disease three times in the recent past. 480 U.S. at 276, 281. The Court held that these facts established that the plaintiff had a "record of . . . impairment" within the meaning of the definitional provision of the Rehabilitation Act that is identical to the "record of impairment" provision of the ADA, and that, since she therefore had a "disability," she was covered by the Act. *Id.* at 281.

In explaining its conclusion, the Court briefly described the reasons for amending the Rehabilitation Act in 1974 to include both the "record or impairment" and

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uals with a history of cancer within the ADA through the "record of impairment" language gives no indication that Congress was distinguishing between cancers that had already caused substantial impairment (usually because of the treatment, such as surgery or chemotherapy, not because of the cancer itself) and those equally serious cancers (such as melanomas) that may be treatable in the first instance through forms of surgery that do not impair the patient's functioning even temporarily.

"regarded as impaired" prongs of the "disability" definition:

> The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93-1297, p. 50 (1974), U.S. Code Cong. & Admin. News 1974, p. 6400. To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] *may at present have no actual incapacity at all.*" *Id.* [480 U.S. at 279 (emphasis added).]

A comparison of the problem presented by employer reliance on past episodes of a disabling illness as the basis for disadvantaging an individual with "no actual incapacity at all," as in *Arline,* and that presented by similar employer reliance on a recorded, continuing, substantially limiting medical condition that, because it is controlled by medicine or medical devices, also creates at present "no actual incapacity at all" confirms two points: first, there is no functional difference of significance between the two types of reliance on an individual's medical records; and second, both present identical issues of policy regarding the appropriate employer treatment of employee medical conditions.

In both instances, the individual has a real, not imagined, history of serious medical impairment, objectively documented, and the *employer is relying on that history, and on information contained in those documents, in making its employment decision.* That the two situations are similar in every relevant regard explains why the

statute does not distinguish between the two but encompasses both in the "record of impairment" definition.[7]

It is also relevant that the situations are distinct—and distinct in the same way— for purposes of appropriate employer decisionmaking processes from the situation in which an employer is simply mistaken about the medical facts concerning the individual. In the latter situation, the Act endeavors only to prohibit employers from acting upon misperceptions concerning individual employee's actual medical circumstances. In the former situations, the policy questions to be addressed are considerably more complex.

In particular, in both the *Arline* kind of case and in this kind of case, the employer's concern is that an apparently dormant or controlled medical condition is capable of becoming active or that the controls are capable of failing while the individual is at work, with the result that the underlying impairment could interfere in some important way with the employee's ability to do her work. In *Arline* the concern was that the individual was not cured and remained contagious; in the case of an individual with a history of heart disease, the concern may well be that there remains an underlying heart condition that will cause a heart attack at a critical moment; in the case of an individual with controlled diabetes or epilepsy, the concern is likely to be that the controls are

[7] In the line of cases of which *Arline* is a paradigm, the individual may or may not have a continuing underlying biological condition; *viz.*, the plaintiff in *Arline* could have a latent tuberculosis infection—which is apparently what the employer feared—or could in fact finally have been permanently cured. The very point of this Court's holding in the cases, is that it does not matter for purposes of the "record of impairment" definition of disability which is the case; rather, bringing that circumstances within the ADA serves to require the employer to ascertain the true medical facts and their significance. Thus, *Arline* confirms that the "record of impairment" provision is *not* limited to past, cured medical conditions.

not perfect, and that the individual will have an epileptic seizure or diabetic reaction despite the medication; and in the present, impaired vision circumstances, the concern, similarly, is that the correction will fail, in this instance through broken, clouded over, or displaced lenses and affect the pilot's ability to cope with an exigent circumstance—*e.g.*, a difficult landing.

In all these situations, the employer's concerns may or may not prove justified when subjected to careful self-scrutiny and, if necessary, to judicial scrutiny. And in all these situations, the relevant factors in undertaking that scrutiny involve consideration of both the medical evidence and of the particular job in question, to determine whether the individual's underlying medical situation could in fact come to the fore on the job and undermine the individual's ability to carry out the job's essential functions.

As *Arline* makes clear, a central thrust of the Rehabilitation Act was to "require[] employers to respond rationally" to individuals with medical records demonstrating a substantially limiting medical condition, by undertaking a prescribed, structured consideration of the pertinent facts and considerations. 480 U.S. at 286 n.15. Similarly, a primary purpose of the ADA, as we have seen (*see* part 1, *supra*), is setting standards for how potentially relevant medical information should be evaluated in determining whether the individual is "otherwise qualified" for the position sought. The "record of impairment" portion of the disability definition furthers that purpose identically both in the *Arline* past medical incidents circumstance and in the present, controlled impairment situation.

In contrast, the statutory interpretation urged by United and adopted by the Tenth Circuit would, with no apparent justification, recognize the ADA's requirement of reasoned, evidenced-based decisionmaking for individuals such as the plaintiff in *Arline*, who may or may not have a continuing impairment but in the past suffered a substantially limit-

ing impairment, but would negate that requirement and permit totally arbitrary reliance on known, serious, current, potentially disabling impairments if the impairment is seemingly under present control and therefore not disabling in the individual's present daily life.[8]

In sum, the "record of impairment" aspect of the ADA's "disability" definition, in its language, administrative interpretation, and avowed purpose, was intended precisely to bring within the ADA employer decision-making based upon the fear that underlying medical or physical impairments documented in an individual's medical records and substantially impairing unless controlled or cured will not remain cured or corrected but will return to affect the individual's ability to perform the job in question.[9] The plaintiffs here therefore had a "record"

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[8] We note once again (see n.2, *supra*) that ADA coverage here should also obtain by reason of the "regarded as impaired" provision, albeit, as we have also noted, through a more circuitous interpretive path.

For example, the "regarded as impaired" analysis appears to turn not upon whether the underlying physical or mental impairment is substantially limiting if untreated but upon whether a sufficiently broad group of job opportunities are precluded, or rather perceived by the employer to be precluded, by the impairment *as controlled*. Thus, by reason of the "regarded as impaired" subsection, an individual denied a job because of controlled diabetes may or may not demand that the employer consider her suitability for employment under the sequential reasoning and evidence-gathering process prescribed by the ADA, depending upon the seemingly irrelevant consideration whether the employer understands the employee to be precluded from a broad or a narrow range of jobs in the labor market. Yet, the actual medical circumstances remain constant, and it is difficult to imagine why Congress would treat the two situations differently or demand complex evidentiary showings regarding employer perceptions about the labor market, as the entry price for triggering the ADA's protections. The "record of impairment" subsection makes no such distinction, and therefore provides more certainty of similar result in conceptually similar cases.

[9] With limited knowledge, it is not plain to us whether the "record of impairment" subsection is pertinent to the other case

of a substantially limiting disability, and are covered by the ADA. As such, they are, like the plaintiff in *Arline* and for similar reasons, entitled to "the opportunity to have their condition evaluated in light of the medical evidence and a determination made as to whether they were 'otherwise qualified'," rather than being "vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent." *Arline*, 480 U.S. at 286.

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relating to a controlled medical condition on which this Court has granted certiorari, *Murphy v. United Parcel Service*, No. 97-1992.

In *Murphy*, the employer's preclusionary standard is based *not* on Mr. Murphy's *uncorrected* medical condition—high blood pressure so serious that the patient could not live unless it was under control—but on Mr. Murphy's blood pressure readings *after partial medical correction*. Whether the "record of impairment" section should apply to that situation is less clear than it is here.

On the one hand, in both instances, the individual in fact has a record of *an* impairment that is undeniably substantially limiting. On the other hand, in *Murphy* the employer's exclusionary standard was not based on the recorded, uncorrected impairment, but on the plaintiff's actual, controlled medical condition.

As such, *Murphy* is similar to a situation in which an individual has an impairment that is substantially limiting but that the employer does not treat as disqualifying or is willing to accommodate, and has additionally another impairment that the employer does treat as disqualifying and as to which there is a dispute whether it is substantially limiting. A lawyer restricted to a wheelchair who also has controlled diabetes would be an example; if the employer denies the lawyer a position because of the diabetes but employs several lawyers who use wheelchairs, we doubt that the fact that the individual has *a* disability (inability to walk) answers the question whether the ADA applies to the employer's diabetes preclusion. In that situation, that is, the conclusion that the lawyer is an individual with a disability by reason of his inability to walk, without more, would not appear to trigger ADA coverage where the employer action concerns a *separate* physical or mental impairment.

We are in no way suggesting that the plaintiff in *Murphy* does not come within subsections (A) or (C) of the "disability" definition, but only that it is much less clear than it is here that subsection (B) applies.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, DC. 20006

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

APPENDIX

APPENDIX
OF
ADA LEGISLATIVE HISTORY OF "RECORD OF IMPAIRMENT" "DISABILITY" DEFINITION, 42 U.S.C. § 12102(2)(B)

(1) The second prong of the definition of the term "disability" includes an individual who has a record of such an impairment, i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment would be prohibited under this legislation. Frequently occurring examples of the first group (i.e., those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (i.e., those who have been misclassified as having an impairment) are persons who have been misclassified as mentally retarded. [Senate Comm. on Labor and Human Resources, S. Rep No. 116, 101st Cong, 1st Sess, at 21, 23 (1989).]

(2) The second prong of the definition of the term "disability" includes an individual who has a record of such impairment, i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment

would be prohibited under this legislation. Frequently occurring examples of the first group (i.e., those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (i.e., those who have been misclassified as having an impairment) are persons who have been misclassified as mentally retarded. [House Comm. on Education and Labor, HR Rep No. 485(II), 101st Cong, 2d Sess, at 50, 52-53 (1990).]

(3) Test B. A record of such an impairment.

This test is intended to cover those who have a record of an impairment. This includes a person who has a history of an impairment that substantially limited a major life activity, such as those who have recovered from an impairment. It also includes persons who have been misclassified as having an impairment. Examples include a person who had, but no longer has, cancer, or a person who was misclassified as being mentally retarded. [House Comm. on the Judiciary, HR Rep No. 485(III), 101st Cong, 2d Sess, at 27, 29 (1990).]

Supreme Court, U.S.
FILED
FEB 22 1999
OFFICE OF THE CLERK

(8)

No. 97-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

GARY PHELAN
Counsel of Record
GARRISON, PHELAN,
LEVIN-EPSTEIN, CHIMES
& RICHARDSON, P.C.
405 Orange Street
New Haven, CT 06511
(203) 777-4425

Attorneys for *Amicus Curiae*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

3088

QUESTION PRESENTED

Should the determination of whether the plaintiffs' visual impairments are a "disability" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A), be made without considering their use of mitigating measures of corrective lenses?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED WHEN DETERMINING WHETHER AN INDIVIDUAL HAS A DISABILITY UNDER THE FIRST PRONG OF THE ADA'S DEFINITION OF DISABILITY 6

A. Mitigating Measures Were Not Considered Under the Rehabilitation Act 6

B. The ADA's Legislative History Demonstrates that Mitigating Measures Should Not Be Considered When Determining Whether an Individual Has a Disability 10

C. The Equal Employment Opportunity Commission's Interpretive Guidance Clarifies that Mitigating Measures Should Not Be Considered When Determining Whether an Impairment Substantially Limits a Major Life Activity 13

D. Interpreting the First Prong of the Definition of Disability to Exclude Consideration of Mitigating Measures Is Consistent with the Statute's Broad Remedial Purposes 15

II. THE ADA SHOULD NOT BE INTERPRETED TO DISCOURAGE INDIVIDUALS FROM ATTEMPTING TO CONTROL THEIR IMPAIRMENTS 17

III. INDIVIDUALS WITH VISUAL IMPAIRMENTS SHOULD NOT BE EXCLUDED FROM THE ADA'S COVERAGE MERELY BECAUSE THE IMPAIRMENT CAN BE EASILY MITIGATED 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases: PAGE(S)

Arnold v. United Parcel Service, Inc.,
136 F.3d 854 (1st Cir. 1998) 4, 10, 12, 13, 14, 15, 16, 17, 18

Baert v. Euclid Beverage, Ltd.,
149 F.3d 626 (7th Cir. 1998) 4

Bartlett v. New York State Board of Law Examiners, 156 F.3d 321
(2d Cir. 1998) 4, 18, 19

Bentivegna v. U.S. Dep't of Labor,
694 F.2d 619 (9th Cir. 1982) 9

Bolton v. Scrivner, Inc.,
36 F.3d 939 (10th Cir. 1994), *cert. denied*,
513 U.S. 1152 (1995) 9

Bragdon v. Abbott,
___ U.S. ___, 118 S.Ct. 2196 (1998) 6, 7, 14

Burlington Industries v. Ellerth,
___ U.S. ___, 118 S.Ct. 2257 (1998) 1

Burroughs v. City of Springfield,
163 F.3d 505 (8th Cir. 1998) 19, 20

Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ... 15

Cleveland v. Policy Management Systems Corp.,
No. 97-1008, *cert. granted*, ___ U.S. ___,
67 U.S.L.W. 3228 (U.S. Oct. 5, 1998) 1

Cook v. State of Rhode Island Dep't of Mental Health, Retardation and Hospitals,
10 F.3d 17 (1st Cir. 1993) 8

Doane v. City of Omaha,
115 F.3d 624 (8th Cir. 1997), *cert. denied*,
___ U.S. ___, 118 S.Ct. 693 (1998) 4, 18

Ellison v. Software Spectrum, Inc.,
85 F.3d 187 (5th Cir. 1996) 2

Fallacaro v. Richardson,
964 F.Supp. 87 (D.D.C. 1997) 8, 9, 21

Faragher v. City of Boca Raton,
___ U.S. ___, 118 S.Ct. 2275 (1998) 1

Gilbert v. Frank,
949 F.2d 637 (2d Cir. 1991) 8, 16

Gilday v. Mescosta County,
124 F.3d 760 (6th Cir. 1997) 5

Harris v. H&W Contracting Co.,
102 F.3d 516 (11th Cir. 1996) 4, 15

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 10

Kirkenberg v. Albertsons, Inc.,
143 F.3d 1228 (9th Cir. 1998), *cert. granted*,
___ U.S. ___, No. 98-591, 1999 WL 5332
(U.S. Jan. 8, 1999) 4, 16, 17

Liff v. Secretary of Transportation,
1994 WL 579912 (D.D.C. 1994) 8

Manuel v. Westlake Polymers Corp.,
66 F.3d 748 (5th Cir. 1995) 1

Matczak v. Frankford Candy and Chocolate Co.,
136 F.3d 933 (3d Cir. 1997) 4, 10, 21

McNemar v. The Disney Store, Inc.,
91 F.3d 610 (3d Cir. 1996), *cert. denied*,
___ U.S. ___, 117 S.Ct. 958 (1997) 1

Miles v. General Services Administration,
1995 WL 766013 (E.D. Pa. 1995) 8

Oncale v. Sundowner Offshore Services, Inc.,
___ U.S. ___, 118 S.Ct. 998 (1997) 1

Oubre v. Entergy Operations, Inc.,
___ U.S. ___, 118 S.Ct. 1466 (1997) 1

Peacock v. County of Marin,
953 F.Supp. 306 (N.D. Cal. 1997) 21

Penny v. United Parcel Service, Inc.,
128 F.3d 408 (6th Cir. 1997) 15, 16

Reynolds v. Brock,
815 F.2d 571 (9th Cir. 1987) 8

School Board of Nassau County v. Arline,
480 U.S. 273 (1987) 16

Shattuck v. Kinetic Concepts, Inc.,
49 F.3d 1106 (5th Cir. 1995) 1

Sicard v. City of Sioux City,
950 F.Supp. 1520 (N.D. Iowa 1996) 21

Siefkin v. Village of Arlington Heights,
65 F.3d 664 (7th Cir. 1995) 19, 20

Strathie v. Dep't of Transportation,
716 F.2d 227 (3d Cir. 1983) 9

Sutton v. United Air Lines, Ltd.,
130 F.3d 893 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943,
1999 WL 5326 (U.S. Jan. 8, 1999) 3, 4, 5, 20

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464
(5th Cir. 1998) 4, 5, 10, 12, 13

Wilson v. Pennsylvania State Police Dep't,
964 F.Supp. 898 (E.D. Pa. 1997) 21

Statutes and Legislative Authorities:

29 U.S.C. §706(8)(B) 5, 6

29 U.S.C. §790 6

42 U.S.C. §12102(2) 3, 13

42 U.S.C. §12111(8) 18

42 U.S.C. §12112(a) 17

42 U.S.C. §12112(8) 19

42 U.S.C. §12116 14

42 U.S.C. §12182(b)(1) 4

42 U.S.C. §12201(a) 8

S. Rep. No. 101-116 (1989) 11, 12

H.R. Rep. No. 101-485 (1990) 11, 12, 21

Federal Regulations:

45 C.F.R. §84.3(j)(2)(i) 7

45 C.F.R. §84.3(j)(2)(ii) 7

28 C.F.R. pt. 35, App. A §35.104 14

29 C.F.R. pt. 1630, App. §1630.2(g) 9

29 C.F.R. pt. 1630, App. §1630.2(h) 14

29 C.F.R. pt. 1630, App. §1630.2(j) 14, 15

INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes.[1] NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law and civil rights issues. Some recent cases before this Court and other courts are: *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998); *Oncale v. Sundowner Offshore Services Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1997); *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S.Ct. 1466 (1997); *Cleveland v. Policy Management Systems Corp.*, No. 97-1008 *cert. granted*, ___ U.S. ___, 67 U.S.L.W. 3228 (U.S. Oct. 5, 1998); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 958 (1997); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 748 (5th Cir. 1995); and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).

NELA members have brought numerous cases under the Americans with Disabilities Act (ADA). NELA mem-

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[1] The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. No persons other than the *Amicus Curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

bers have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect and defend the interests of employees involved in workplace disputes, including workers who are involved in ADA litigation.

This case presents an opportunity to clarify that the question of whether an individual has a "disability" should be made without considering the individual's use of mitigating measures such as medications, prosthetic devices and auxiliary aids. NELA submits this brief to urge the Court to conclude that the individual's use of mitigating measures should not be considered when determining whether the person has a substantial limitation of a major life activity.

STATEMENT OF THE CASE

The plaintiffs, Karen and Kimberly Sutton, are twin sisters who currently work as commercial airline pilots for regional commuter airlines. In 1997, they each applied for commercial airline pilot positions with United Air Lines, Inc. During their interviews, the plaintiffs were informed that their uncorrected vision disqualified them from pilot positions with United because it required applicants to have uncorrected vision of 20/100 in each eye. The plaintiffs have uncorrected vision of 20/200 in the right eye and 20/400 in the left eye. With corrective eyewear, the plaintiffs each have vision of 20/20 in both eyes.

The plaintiffs filed suit under the ADA, claiming that United refused to hire them because of their disability of uncorrected vision and/or because United regarded them to be disabled. The plaintiffs claimed that their uncorrected vision was permanent and substantially limited them in the major life activity of seeing.

The district court granted United's motion to dismiss, reasoning that the plaintiffs were not disabled within the meaning of the ADA because their vision did not substantially limit them in the major life activity of seeing. 1996 WL 588917 *3 (D. Colo., Aug. 28, 1996). The district court also rejected the plaintiffs' claim that the defendant regarded them to be disabled, reasoning that the plaintiffs only established that United regarded them as unable to satisfy the requirements for a passenger airline pilot position with one airline.

The Tenth Circuit affirmed the district court's decision granting the defendant's motion to dismiss. In reaching its decision, the Tenth Circuit held that determining whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures used by the individual. *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943, 1999 WL 5326 (U.S. Jan. 8, 1999). The *Sutton* court also affirmed the district court's decision that the plaintiffs failed to show that United regarded them to be disabled. *Id.* at 903-06.

SUMMARY OF THE ARGUMENT

The ADA was adopted by Congress in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12182(b)(1). Many of those individuals with disabilities often use mitigating measures, such as medications, prosthetic devices or auxiliary aids, to accommodate their disabilities.

The ADA is a remedial statute which must be construed broadly to effectuate its purpose. Some courts have narrowly interpreted the term "disability" by ruling that an individual's use of a mitigating measure should be taken into consideration when determining whether the individual is covered under the ADA. However, eight of the ten circuit courts of appeals that have addressed the question have rejected that position. *Compare Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Kirkenberg v. Albertson's, Inc.*, 143 F.3d 1228, 1232-33 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (U.S. Jan. 8, 1999); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857-65 (1st Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996); with *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997); *cert. granted*, ___ U.S. ___, No. 97-1943, 1999 WL 5326 (U.S. Jan. 8, 1999); *Gilday v. Mecosta County*, 124 F.3d 760, 767, 768 (6th Cir. 1997).[2] *Amicus* asks this Court to embrace the views of the overwhelming number of courts that have broadly interpreted the statute to exclude consideration of mitigating measures.

The ADA's definition of disability is derived from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B). Courts interpreting the definition of "handicapped individual" under the Rehabilitation Act have routinely excluded consideration of mitigating measures. Both ADA's legislative history and the Equal Employment Opportunity Commission's ("EEOC") Interpretive Guidance also state that mitigating measures should not be considered when determining whether an individual is substantially limited in a major life activity and, therefore, covered under the ADA. Interpreting the ADA to exclude consideration of mitigating measures is consistent with the statute's broad remedial purposes.

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[2] In *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996), the Fifth Circuit stated in *dicta* that an individual's use of mitigating measures should be considered when determining whether the individual is substantially limited in a major life activity. *Id.* at 191-92 n. 3. However, the Fifth Circuit abandoned that position in *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 n. 5 (5th Cir. 1998).

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED WHEN DETERMINING WHETHER AN INDIVIDUAL HAS A DISABILITY UNDER THE FIRST PRONG OF THE ADA'S DEFINITION OF DISABILITY.

A. Mitigating Measures Were Not Considered Under the Rehabilitation Act.

The ADA defines the term "disability" as:

(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) a record of such an impairment; or

(c) being regarded as having such an impairment.

42 U.S.C. §12102(2). The ADA's definition of disability is derived "almost verbatim" from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B); *Bragdon v. Abbott*, 118 S.Ct. 2196, 2202 (1998). The ADA provides at 42 U.S.C. §12201(a) that:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards used under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 *et seq.*) or the regulations issued by the Federal agencies pursuant to such title.

In *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), this Court interpreted that language to "require [ ] us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Id.* at 2202.

The Rehabilitation Act's regulations define "physical or mental impairment" as:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. §84.3(j)(2)(i) (1997).

The Rehabilitation Act's regulations contain a representative list of "major life activities" and define the term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. §84.3(j)(2)(ii) (1997). The list of major life activities "is illustrative, not exhaustive." *Bragdon*, 118 S.Ct. at 2205 (concluding that reproduction is a major life activity even though not specifically enumerated in the regulations).

This Court observed in *Bragdon* that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Id.* at 2208 (citations omitted). Courts have never considered the use of mitigating measures when interpreting the definition of "handicapped" under the Rehabilitation Act and its regulations. Therefore, this Court should sim-

ilarly exclude consideration of the use of mitigating measures when analyzing whether the individual is substantially limited in one or more major life activities.

In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), for example, the Ninth Circuit held that epilepsy was a handicap even though it was controlled by medication. *Id.* at 574. In *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991), the Second Circuit stated that "[w]e are inclined to view persons whose kidneys would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as being substantially limited in their ability to care for themselves." *Id.* at 641. The First Circuit concluded in *Cook v. State of Rhode Island Dep't of Mental Health, Retardation and Hospitals*, 10 F.3d 17 (1st Cir. 1993) that an individual with morbid obesity had a handicap under the Rehabilitation Act, even though she could treat the manifestations of her dysfunctional metabolism through fasting or undereating. *Id.* at 24.

Although the plaintiff's diabetes, carpel tunnel syndrome and depression were controllable with medication, the court in *Miles v. General Services Administration*, 1995 WL 766013 (E.D. Pa. 1995) concluded that the plaintiff was handicapped within the meaning of the Rehabilitation Act. The court in *Liff v. Secretary of Transportation*, 1994 WL 579912 (D.D.C. 1994) rejected the defendant's argument that the plaintiff was not "handicapped" because her depression was controlled by medication, reasoning that "Congress intended that the determination of whether an impairment substantially limits a major life activity is to be made without regard

to medication." The court relied, in part, on the language and purpose of the Rehabilitation Act in *Fallacaro v. Richardson*, 964 F.Supp. 87 (D.D.C. 1997) for its conclusion that a person who was totally blind was handicapped under the statute, even though she had 20/20 vision with corrective lenses.[3]

In *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995), the Tenth Circuit observed that "Congress intended that the relevant case law developed under the Rehabilitation Act be generally be applicable to the term 'disability' under the ADA." *Id.* at 897 (*citing* 29 C.F.R. §1630, App. §1630.2(g)). This Court should reject the Tenth Circuit's attempt in the instant case to disregard its own admonition and construe the ADA's definition of disability more narrowly than the Rehabilitation Act's definition of the term of "handicap." Because the Rehabilitation Act's definition of "handicap" did not require that mitigating measures be considered, repeating the same definition of "disability" under the ADA clarified that Congress intended to incorporate that interpretation into the ADA as well.

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[3] See also, e.g., *Strathie v. Dep't of Transportation*, 716 F.2d 227, 228-29 (3d Cir. 1983) (undisputed that individual with a hearing impairment was handicapped under the Rehabilitation Act even though with the use of a hearing aid his hearing was corrected to an acceptable level under relevant state law); *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982) (accepting without discussion that individual with insulin-dependent diabetes was handicapped under the Rehabilitation Act).

B. The ADA's Legislative History Demonstrates that Mitigating Measures Should Not Be Considered When Determining Whether an Individual Has a Disability.

The starting point for interpreting a statute "is the language of the statute itself." *Arnold v. United Parcel Service*, 136 F.3d 854, 857 (1st Cir. 1998) (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)). Most courts that have examined the question have concluded that the ADA does not clearly state whether mitigating measures should be considered when examining whether an individual has a substantial impairment of one or more major life activities. See, e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 467 (5th Cir. 1998); *Arnold v. United Parcel Service*, 1367 F.3d 854, 859 (1st Cir. 1998) ("A reasonable person could interpret the plain statutory language to required an evaluation either before or after ameliorative treatment."); *Matzczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

If a statute's text is not absolutely clear, the next source for guidance to ascertain the statute's meaning is its legislative history. *Arnold*, 136 F.3d at 858. The ADA's legislative history plainly demonstrates that mitigating measures should not be considered when determining whether an individual has a substantial impairment of one or more major life activities.

In describing the first prong of the definition of disability, the House Judiciary Committee Report states that:

> The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment are controllable by medication. H.R. Rep. No. 101-485 (III) at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").

Similarly, the House's Education and Labor Committee Report provides that:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. H.R. Rep. No. 101-485 (II) at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report").

The Senate Report also provides that determining whether a person has a disability under the ADA "should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S.Rep. No. 101-116 at 23 (1989) ("Senate Report").

The Senate Report does contain language which some courts have interpreted to be inconsistent with the position that the question of whether a condition is covered under the "first prong" of the definition of dis-

ability excludes consideration of mitigating measures.[4] See e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998). While discussing the third prong of the definition of disability, the Senate Report states that:

> Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

Senate Report at 24.

In *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998), the First Circuit concluded that these two passages from the Senate Report were not inconsistent, reasoning that "these passages can be easily squared by recognizing that an individual could have a 'disability' under *both* prong one (having an impairment that substantially limits a major life activity) *and* prong three ('regarded as' having such an impairment) at the same time; one does not preclude the other." *Id.* at 860 (emphasis in original). Moreover, the House Reports, which came after the Senate Reports, did not incorporate the Senate Report's discussion of medicated conditions under the third prong of the disability of definition. That omission led the Fifth Circuit to conclude that:

> Given that much of the structure and language of the House Report was borrowed from the Senate Report, it seems that the House Committees were aware of how the Senate Report dealt with the mitigating measures issue and consciously changed the language of the Reports.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 468 (5th Cir. 1998).[5]

C. The EEOC's Interpretive Guidance Also States that Mitigating Measures Should Not Be Considered When Determining Whether an Impairment Substantially Limits a Major Life Activity.

If the plain language and legislative history do not clarify the statute's meaning, a court must defer to the interpretation of the agency charged with enforcing the statute, provided the interpretation "flows rationally from a permissible construction of the statute." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (citations omitted). The ADA authorized the EEOC to issue regulations to enforce the statute. 42 U.S.C. §12116 (1994). The EEOC exercised that author-

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[4] The "first prong" of the definition of disability refers to whether the individual has a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. §12102(2)(A). The "third prong" of the definition of disability refers to someone who does not have a "disability" under the first prong of the definition but is "regarded" by the employer as having such an impairment. 42 U.S.C. §12102(2)(C).

[5] The Fifth Circuit also observed that ". . . the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed." *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

ity by promulgating regulations and attaching to those regulations guidelines for interpreting the ADA. *Id.* at 863. Although the EEOC's interpretive guidelines are not, like regulations, controlling, they "constitute a body of experience and informed judgment to which courts and litigants may properly result for guidance." *Bragdon v. Abbott*, 118 S.Ct. 2196, 2207 (1998) (citation omitted).[6]

In its Interpretive Guidance, the EEOC states that the existence of an impairment must be determined "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(h). The guidelines later elaborate that the "determination of whether an individual is substantially limited in a major life activity" must be made "without regard to mitigating measures such as medicines or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(j).[7] The EEOC's Interpretive Guidance also provides that:

> An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable

[6] In *Bragdon*, this Court looked to the EEOC's pronouncements for guidance in concluding that an individual's asymptomatic HIV disease was a substantial limitation of the major life activity of reproduction. *Id.* at 2209.

[7] The United States Department of Justice ("DOJ"), which enforces the ADA's prohibition of disability discrimination in employment in state and local government entities, has also stated that "disability should be assessed without regard to the availability of mitigating measures." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998) (*quoting* 28 C.F.R. Part 35, App. A §35.104).

> to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. pt.1630, App. §1630.2(j).

This Court has held that an agency's interpretation of a statute it administers "should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise." *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). There is no conflict between the EEOC's interpretive guidance and either the statute or its legislative history. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996). Rather, "[t]he EEOC's interpretation is not merely 'permissible;' it is entirely consistent with the ADA's legislative history and broad remedial purposes." *Arnold*, 136 F.3d at 864.

D. Interpreting the First Prong of the ADA's Definition of Disability to Exclude Consideration of Mitigating Measures Is Consistent with the Statute's Broad Remedial Purpose.

When construing a statute, a court must "interpret the words of [the statute] in light of the purposes Congress sought to serve." *Arnold v. United Parcel Services, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (citations omitted). The ADA is a "broad remedial statute." *Penny v. United Parcel Service, Inc.*, 128 F.3d 408, 414

(6th Cir. 1997). Remedial legislation like the ADA "should be construed broadly to effectuate its purpose." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998); see also *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (observing that the Federal Rehabilitation Act and its regulations should be interpreted broadly).

In the employment discrimination arena, the ADA's fundamental purpose is "to protect individuals who have an underlying medical condition or other limiting impairment, but who *are* in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original) (citations omitted). In *Arnold*, the First Circuit concluded that "[c]onceptually, it seems more consistent with Congress' broad remedial goals, and it also makes more sense, to interpret the words 'individual with a disability' more broadly, so the Act's coverage protects more types of people against discrimination." 136 F.3d at 861.[8] The Ninth Circuit reached the same conclusion in *Kirkenburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (1999), reasoning that the ADA "was drafted in broad language in order to protect a large class of physically

[8] The *Arnold* court's interpretation mirrors this Court's observation in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) that when interpreting the definition of "handicap" under the Federal Rehabilitation Act "a broad definition, one not limited to the so-called 'traditional handicaps,' is inherent in the statutory definition." *Id.* at 280 n. 5.

impaired individuals from unwanted discrimination—it was not drafted narrowly to protect only those with the most severe disabilities." *Id.* at 1233. Employers are not jeopardized by a broad interpretation of the term "disability" because individuals seeking protection under the statute must still be "qualified" to perform the essential functions of the job. 42 U.S.C. §§12111(8), 12112(a) (1994); see *Kirkenburg*, 143 F.3d at 1233; *Arnold*, 136 F.3d at 861-62.

II. THE ADA SHOULD NOT BE INTERPRETED IN A MANNER THAT WOULD DISCOURAGE INDIVIDUALS FROM ATTEMPTING TO CONTROL THEIR IMPAIRMENTS.

In *Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998), the court stated that concluding that Arnold's diabetes was not covered under the prong of the ADA's definition of disability would provide him with a disincentive to controlling his impairment, reasoning that:

> UPS's interpretation could very well produce results antithetical to its expressed concerns and to the Act's attempt to take such concerns into account that a person with a disability is able to use medical knowledge and technology to overcome many of the effects of his illness (in Arnold's case, by a continuing regimen of medicine, proper eating habits and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination because of his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes

> under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self help.

Arnold, 136 F.3d at 863 n. 7.

Endorsing the Tenth Circuit's position on mitigating measures would not merely deter individuals from taking advantage of medical knowledge and technology. Rather, it would also deter individuals from developing "self-accommodations" for their impairment. In *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998), for example, the court held that a police officer, blinded in one eye, was disabled under the first prong of the ADA's definition of disability even though he had developed "subconscious adjustments" which enabled him to compensate for his limitations. *Id.* at 627. According to the Eighth Circuit, Doane's "brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments should not take him outside the protective provisions of the ADA." *Id.* at 627-28. Similarly, the plaintiff in *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), had a learning and reading impairment which significantly restricted her ability to timely identify and decipher the written word. *Id.* at 329. Dr. Bartlett developed "self-accommodations" which improved her ability to spell and her performance on word identity and work attack tests. *Id.* at 326. The Second Circuit concluded that "[h]er history of

self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population 'do not take [her] outside the protective provisions of the ADA.'" *Id.* at 329 (quoting *Doane*).

An individual who elects not to use an available mitigating measure because it would result in exclusion from the ADA's coverage is still placed in a precarious position because they may no longer be a "qualified" individual with a disability, 42 U.S.C. §12112(8), as defined by the ADA. In *Siefkin v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), for example, the defendant hired Siefkin, an individual with diabetes, as a probationary police officer, believing that he "could monitor his medical condition sufficiently to allow him to perform the duties of a police officer." *Id.* at 666. However, he failed to monitor his diabetes properly on one occasion and suffered a diabetic reaction while on duty driving a patrol car. *Id.* at 665. The employer terminated him and refused to give him a second chance to show that he could control his diabetes. *Id.* at 665, 666-67. The Seventh Circuit upheld the district court's dismissal of the case for failure to state a claim, reasoning that the plaintiff was fired because he failed to control a controllable disease. The Eighth Circuit reached the same conclusion in *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). Despite Burrough's assurance that he could keep his diabetes under control, he twice suffered a severe diabetic episode due to poor timing of his meals and activities which rendered him unable to perform his job as a police officer. The Eighth Circuit, relying on *Siefkin*, upheld the District Court's dismissal of his ADA claim, reasoning that

it was legitimate for the city to expect and require its patrol officers to be functional and alert at all times while on duty. *Id.* at 507. As the facts in both *Siefkin* and *Burroughs* illustrate, interpreting the ADA in a manner that discourages individuals from controlling their impairments could also jeopardize public safety.

III. INDIVIDUALS WITH VISUAL IMPAIRMENTS SHOULD NOT BE EXCLUDED FROM THE ADA'S COVERAGE MERELY BECAUSE THE IMPAIRMENT CAN BE EASILY MITIGATED.

The courts which have concluded that individuals with corrected vision of 20/20 are not covered under the first prong of the ADA's definition of disability have focused on the relative ease of mitigating a visual impairment. In *Sutton v. United Air Lines*, 130 F.3d 893 (10th Cir. 1997), *cert. granted*, No. 97-1992, 1999 WL 5326 (U.S. Jan. 8, 1999), the Tenth Circuit reasoned that "[p]laintiffs merely don their eyeglasses (or contact lenses) and go about all their normal daily activities in the same or similar condition, manner or duration as the average person in the general population." *Id.* at 903. However, there is nothing in either the ADA's legislative history or the EEOC Regulations and Interpretive Guidance which provides that certain impairments should not be covered under the first prong of the definition of disability, if the mitigating measures for treating the impairment are either easy to use or common. In fact, the House Labor Report specifically identified another relatively common mitigating measure of a hearing aid, stating that "a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid." H.R. Rep. No. 101-485(1), at 42 (1990), *reprinted* in 1990 U.S.C.C.A.N. 334. There is no reason to distinguish between a visual impairment corrected through the use of eyewear and a hearing impairment corrected through the use of a hearing aid. See *Wilson v. Pennsylvania State Police Dep't*, 964 F.Supp. 898, 906 & n. 9 (E.D. Pa. 1997) (analogizing eyeglasses to hearing aids and observing that "[d]efendants would be hard pressed to argue that eyeglasses and contact lenses are not 'mitigating measures.'")

In an uncorrected state, individuals with visual impairments may be substantially limited in several major life activities. See, e.g., *Wilson*, 964 F.Supp. at 907 (without corrective eyewear, plaintiff's vision was blurred and unfocused and substantially limited him in several daily activities which involved seeing, such as driving, cooking, reading and caring for his infant son); *Peacock v. County of Marin*, 953 F.Supp. 306, 309 (N.D. Cal. 1997) (without corrective lenses, plaintiff would be severely limited in seeing, learning, caring for himself, participating in community activities and walking); *Sicard v. City of Sioux City*, 950 F.Supp. 1420, 1439 (N.D. Iowa 1996) (without corrective lenses, plaintiff could not read, drive an automobile, read street signs, watch television or movies, walk in unfamiliar surroundings or perform any of the duties of the firefighter position he sought). The Tenth Circuit's analysis of the issue ultimately fails because it confuses the impairment with its treatment. See *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

In *Fallacaro v. Richardson*, 965 F.Supp. 87 (D.D.C. 1997), the court rejected the argument that an individual who was legally blind without corrective lenses but had 20/20 vision with contact lenses was not disabled within the meaning of the Rehabilitation Act, reasoning that "[n]either as a matter of law nor common sense would we say that they are not impaired or disabled because their prosthetic device happens to be exceptionally good." *Id.* at 93. According to the *Fallacaro* court, "[i]t makes little sense to deprive an entire class of disabled individuals—the legally blind who have correctable vision—of the protections of the Act merely because it is so easy to accommodate their disability." *Id.*

CONCLUSION

The judgment of the Court of Appeals for the Tenth Circuit should be reversed and the case remanded to the District Court for a full hearing on its merits.

Respectfully submitted,

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

GARY PHELAN
Counsel of Record
GARRISON, PHELAN,
LEVIN-EPSTEIN, CHIMES
& RICHARDSON, P.C.
405 Orange Street
New Haven, CT 06511
(203) 777-4425

Attorneys for *Amicus Curiae*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

(9) (9)

Nos. 97-1943 and 97-1992

FILED
FEB 22 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

KAREN SUTTON AND KIMBERLY HINTON,
Petitioners,

v.

UNITED AIRLINES, INC.,
Respondent.

VAUGHN L. MURPHY,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AIDS ACTION, *et al,* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Claudia Center*
Guy Wallace
Sarah Colby

Counsel for *Amici Curiae*
*Counsel of Record

Employment Law Center
A Project of the Legal Aid Society
of San Francisco
1663 Mission Street, Suite 400
San Francisco, CA 94103
(415) 864-8848

56pp

AIDS ACTION; AIDS LEGAL REFERRAL PANEL; AIDS LEGAL SERVICES; AIDS NATIONAL INTERFAITH NETWORK; CENTER FOR LAW IN THE PUBLIC INTEREST; CENTER FOR WOMEN POLICY STUDIES; DISABILITY RIGHTS ADVOCATES; EMPLOYMENT LAW CENTER, A PROJECT OF THE LEGAL AID SOCIETY OF SAN FRANCISCO; EPILEPSY FOUNDATION OF AMERICA; GAY AND LESBIAN MEDICAL ASSOCIATION; GAY MEN'S HEALTH CRISIS; HUMAN RIGHTS CAMPAIGN; JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; LLEGÓ, NATIONAL LATINA/O LESBIAN, GAY, BISEXUAL AND TRANSGENDER ORGANIZATION; MENTAL HEALTH ADVOCACY PROJECT; NATIONAL ALLIANCE FOR THE MENTALLY ILL; NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS; NATIONAL CENTER FOR LAW AND LEARNING DISABILITIES, INC.; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL DEPRESSIVE AND MANIC-DEPRESSIVE ASSOCIATION; NATIONAL HEALTH LAW PROGRAM; NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.; RESOLVE, THE NATIONAL INFERTILITY ASSOCIATION; THE WORLD INSTITUTE ON DISABILITY.

TABLE OF CONTENTS

Table of Authorities iv

Interest Of The *Amici Curiae* 1

ARGUMENT 1

I. THE DEFINITION OF DISABILITY UNDER THE ADA IS INTENTIONALLY BROAD TO ACHIEVE THE CIVIL RIGHTS PURPOSES OF THE LAW. 2

II. IN ENACTING THE ADA, CONGRESS ADOPTED THE COVERAGE OF THE REHABILITATION ACT AS A MINIMUM STANDARD 3

A. Section 504 Case Law Protected Individuals With Mitigated Disabilities 4

B. Section 504 Regulations Confirm a Broad Definition of Disability 6

III. CONGRESS STATED THAT MITIGATING MEASURES ARE NOT TO BE CONSIDERED IN DETERMINATING WHETHER AN INDIVIDUAL IS DISABLED 7

A. The Instruction of Congress to Disregard Mitigating Measures Is Consistent with its Intent to Protect Persons with Treatable Disabilities. 8

B. Congress Expressed a Keen Interest in Promoting Treatment for Individuals with Disabilities 10

IV. THE FEDERAL AGENCIES CHARGED WITH ENFORCING THE ADA HAVE STATED THAT MITIGATING MEASURES SHOULD NOT BE CONSIDERED IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY 13

V. THE MAJORITY OF FEDERAL COURTS HAVE DISREGARDED MITIGATING MEASURES IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY..... 14

VI. EXCLUDING INDIVIDUALS WITH TREATABLE DISABILITIES FROM THE COVERAGE OF THE ADA IS CONTRARY TO ITS FUNDAMENTAL PURPOSES. 17

A. Excluding Individuals with Treatable Disabilities is Contrary to the Statute's Focus on Individuals Who are Able to Work Despite Their Disabilities. 18

B. Excluding Individuals with Treatable Disabilities Overlooks the Real Need for Workplace Accommodations to Maintain Health..... 20

C. Excluding Individuals Who Mitigate Their Symptoms with Medications and Other Measures Falsely Presumes a "Complete Cure." 21

D. Excluding Individuals with Treatable Disabilities Would Lead to Irrational and Pernicious Results. 23

VII. THE CONCERNS OF EMPLOYERS ARE AMPLY REPRESENTED. 23

VIII. INDIVIDUALS WHO ARE DENIED EMPLOYMENT OPPORTUNITIES ON THE BASIS OF A DISABILITY ARE REGARDED AS HAVING A DISABILITY. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases.

Akers v. Bolton,
531 F. Supp. 300 (D. Kan. 1981) 4

Anderson v. University of Wisconsin,
665 F.Supp. 1372 (W.D. Wis. 1987),
aff'd, 841 F.2d 737 (7th Cir. 1988)..... 5

Arnold v. United Parcel Service, Inc.,
136 F.3d 854 (1st Cir. 1998)
..... 14, 18, 21, 23, 25

Baert v. Euclid Beverage, Ltd.,
149 F.3d 626 (7th Cir. 1998)..... 15

Bentivegna v. United States Dep't of Labor,
694 F.2d 619 (9th Cir. 1982)..... 4

Bragdon v. Abbott, 524 U.S. 624,
118 S. Ct. 2196 (1998)
.....3, 5, 6, 13, 20, 23

Buckingham v. United States,
998 F.2d 735 (9th Cir. 1993)..... 21

Burka v. New York City Transit Authority,
680 F.Supp. 590 (S.D.N.Y. 1988)..... 5

Chandler v. City of Dallas,
2 F.3d 1385 (5th Cir. 1993)..... 15

Cline v. Fort Howard Corp.,
963 F. Supp. 1075 (E.D. Okla. 1997)..... 17

Coghlan v. H.J. Heinz Co.,
851 F. Supp. 808 (N.D. Tex. 1994)..... 17

Coleman v. Keebler Company,
997 F. Supp. 1102 (N.D. Ind. 1998)..... 15

Coleman v. Southern Pacific Transp. Co,
997 F. Supp. 1197 (D. Ariz. 1998)..... 16

Criado v. I.B.M. Corp.,
145 F.3d 437 (1st Cir. 1998)..... 15

Davis v. Bucher,
451 F.Supp. 791 (E.D. Pa. 1978) 5

Davis v. Meese,
692 F. Supp. 505 (E.D. Pa. 1988),
aff'd, 865 F.2d 592 (3d Cir. 1989) 4

Denson v. Village of Bridgeview,
19 F. Supp. 2d 829 (N.D. Ill. 1998) 15

Doane v. City of Omaha,
115 F.3d 624 (8th Cir. 1997),
cert. denied, __ U.S. __,
118 S. Ct. 693 (1998)..... 16

Doe v. Garrett,
903 F.2d 1455 (11th Cir. 1990)..... 5

Drennon v. Philadelphia General Hosp.,
428 F. Supp. 809 (E.D. Pa. 1977) 4

Ellison v. Software Spectrum, Inc.,
85 F.3d 187 (5th Cir. 1996)..... 16

Erjavac v. Holy Family Health Plus,
13 F. Supp. 2d 737 (N.D. Ill. 1998)
..... 15, 21

Fallacaro v. Richardson,
965 F. Supp. 87 (D. D.C. 1997).....16

Fehr v. McLean Packaging Corp.,
860 F. Supp. 198 (E.D. Penn. 1994) 22

Gaddy v. Four B Corp.,
953 F. Supp. 331 (D. Kan. 1997) 17

Gilday v. Mecosta Cty.,
124 F.3d 760 (6th Cir. 1997)..... 17

Gile v. United Airlines, Inc.,
95 F.3d 492 (7th Cir. 1996),
reh'g en banc denied,
1996 U.S. App. LEXIS 27503
(7th Cir. 1996).....21

Guice-Mills v. Derwinski,
967 F.2d 794 (2nd Cir. 1992)..... 22

Harris v. H & W Contracting Co.,
102 F.3d 516 (11th Cir. 1996)..... 16, 22

Heilweil v. Mt. Sinai Hosp.,
32 F.3d 718 (2nd Cir. 1994),
cert. denied, 513 U.S. 1147 (1995)..... 17

Helen L. v. DiDario,
46 F.3d 325 (3d Cir. 1995)..... 3

Holihan v. Lucky Stores, Inc.,
87 F.3d 362 (9th Cir. 1996),
cert. denied, __ U.S. __,
117 S. Ct. 1349 (1997)..... 16

Kaiser Aluminum & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990)..... 7

Kirkingburg v. Albertson's, Inc.,
143 F.3d 1228 (9th Cir. 1998)..... 16

Krocka v. Riegler,
958 F. Supp. 1333 (N.D. Ill. 1997) 15

Mantolete v. Bolger,
767 F.2d 1416 (9th Cir. 1985) 4

Matczak v. Frankford Candy & Chocolate Co.,
136 F.3d 933 (3rd Cir. 1997) 15

Meritor Savings Bank, F.S.B. v. Vinson,
477 U.S. 57 (1986)..... 13

Mondzelewski v. Pathmark Stores, Inc.,
162 F.3d 778 (3rd Cir. 1998) 15

Moore v. City of Overland Park,
950 F. Supp. 1081 (D. Kan. 1996)..... 17

Murphy v. U.P.S.,
946 F. Supp. 872 (D. Kan. 1996),
aff'd, 141 F.3d 1185 (10th Cir. 1998). 29, 30

Nathanson v. Medical College of Pennsylvania,
926 F.2d 1368 (3d Cir. 1991) 25

Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.,
464 U.S. 30, 36 (1983) 10

Overton v. Reilly,
977 F.2d 1190 (7th Cir. 1992) 22

Pritchard v. Southern Co. Services,
92 F.3d 1130 (11th Cir. 1996),
amend. on rhg. in part by
102 F.3d 1118 (11th Cir. 1996),
cert. denied, 117 S.Ct. 2453
(U.S. 1997) 18, 19

Ray v. School Dist. of DeSoto County,
666 F. Supp. 1524 (M.D. Fla. 1987) 5

Reynolds v. Brock,
815 F.2d 571 (9th Cir. 1987) 4

Robertson v. Granite City Com. Unit School Dist. 9,
684 F.Supp. 1002 (S.D. Ill. 1988) 5

Roth v. Lutheran Gen. Hosp.,
57 F.3d 1446 (7th Cir. 1995) 15

Sarsycki v. U.P.S.,
862 F. Supp. 336 (W.D. Okla. 1994) 16

School Bd. of Nassau County v. Arline,
480 U.S. 273 (1987) ..... *passim.*

Shulter v. Industrial Coils, Inc.,
928 F. Supp. 1437 (W.D. Wis. 1996) 17

Sicard v. City of Sioux City,
950 F. Supp. 1420 (N.D. Iowa 1996) 16

Smith v. Horton Industries, Inc.,
17 F. Supp. 2d 1094 (D.S.D. 1998) 16

Sullivan v. City of Pittsburgh, PA.,
811 F.2d 171 (3d Cir. 1987) 5

Sutton v. United Airlines,
130 F.2d 893 (10th Cir. 1997) 28, 29, 30

Tcherepnin v. Knight,
389 U.S. 332 (1967) 18

Thomas v. Atascadero Unified School Dist.,
662 F. Supp. 376 (C.D. Cal. 1987) 5

Tinch v. Walters,
765 F.2d 599 (6th Cir. 1985) 5

Traynor v. Turnage,
485 U.S. 532 (1988) 5

Traynor v. Walters,
606 F.Supp. 391 (S.D.N.Y. 1985) 5

United States v. Dickerson,
310 U.S. 554 (1940) 7

United States v. Turkette,
452 U.S. 576 (1981) 23

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464 (5th Cir. 1998) 15

Wallace v. Veterans Administration, 683 F.Supp. 758 (D. Kan. 1988) 5

Wilking v. County of Ramsey, 983 F. Supp. 848 (D. Minn. 1997) 17

Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898 (E.D. Pa. 1997) 16

Statutes.

The Americans with Disabilities Act of 1990,
42 U.S.C. § 12101 *et seq.* ..... *passim.*
42 U.S.C. § 12101(a)(7) 1
42 U.S.C. § 12101(b)(1) 2
42 U.S.C. § 12102(2) 3, 7, 25
42 U.S.C. § 12111(8) 24
42 U.S.C. § 12111(9)(B) 21
42 U.S.C. § 12111(10) 24
42 U.S.C. § 12112(a) 24
42 U.S.C. § 12112(b)(5)(A) 24
42 U.S.C. § 12113(b) 24
42 U.S.C. § 12201(a) 4

Section 504 of the Rehabilitation Act of 1973
29 U.S.C. § 794 ..... 3, 4, 5

Regulations and Guidance.

45 C.F.R. § 84.3(j)(2)(i) 6

42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. Pt. 84, App. A, p. 334 (1998) 6

28 C.F.R. Pt. 35, App. A, § 35.104 14

29 C.F.R. Pt. 1630, App., § 1630.2(j) 13, 24, 25

EEOC, Technical Assistance Manual (TAM) (Jan. 1992) 21

EEOC Compliance Manual, EEOC Order No. 915.002, Section 902, *Definition of the Term "Disability"* (Mar. 14, 1995) 14

EEOC Order No. 915.002, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (Mar. 25, 1997) 14, 21, 22

Brief of the EEOC, *Graham v. Connie's Inc.*, No. 98-35242 (9th Cir.) (filed July 15, 1998) 25

Legislative History.

House Comm. on Educ. & Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess. (1990) ..... *passim.*

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H.R. Rep. No. 485(III),
101st Cong., 2d Sess.
(1990) 8, 9, 10, 27, 28, 29

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S. Rep. No. 116, 101st Cong.,
1st Sess. (1989) ..... *passim.*

135 Cong. Rec. E 1575, *1575 (May 9, 1989)
(Statement of Rep. Coehlo)..... 9

135 Cong Rec S 10765 (Sept. 7, 1989)

S10765-66 (Statement of
Sen. Harkin) 10, 19

S10765-66 (Statement of
Sen. Kennedy)..... 10

S10774 (Statement of Sen.
Kennedy)..... 12

S10779 (Statement of
Sen. Domenici)..... 19

S10795 (Statement of Sen.
Moynihan)..... 12

S10800 (Statement of Sen.
Simon)..... 10

136 Cong Rec H 2421 (May 17, 1990)

H2427 (Statement of Rep.
Hoyer) 9

H2442 (Statement of Rep.
Weiss)..... 11

136 Cong Rec H 2599 (May 22, 1990)

H2626 (Statement of Rep.
McDermott)..... 12

136 Cong Rec S 7422 (June 6, 1990)

S7444 (Statement of Sen.
Harkin) 2

136 Cong Rec E 1913 (June 13, 1990)

E1914 (Statement of Rep.
Hoyer) 8

136 Cong Rec H 4614 (July 12, 1990)

H4623 (Statement of Rep.
Owens) 11

H4626 (Statement of Rep.
Waxman)..... 11

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S9696 (Statement of Sen.
Kennedy)..... 10, 11

Additional Authority.

Fisher, R.S., *et al.*, "A Large Community-
Based Survey of Quality of Life and

Concerns of People With Epilepsy:
Part 1," 39:6 *Epilepsia* (1998)..... 22

Goodwin, Frederik K. and Jamison, Kay
Redfield, M*anic Depressive Illness* (1990)..... 22

Lickey, Marvin E. and Gordon,
Medicine and Mental Illness (1991) 22

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* joining this brief are organizations that represent individuals with disabilities, including individuals with disabilities that are ameliorated or treated with mitigating measures such as medications. The *amici* share a commitment to eradicating the debilitating discrimination faced by persons with disabilities, and to ensuring equality and reasonable accommodation in the workplace and other settings covered by federal disability law. The *amici* have a strong interest in the effective implementation of the Americans with Disabilities Act ("ADA"), and bring a unique understanding of the purpose and role of laws barring disability-based discrimination. A full recitation of their interest appears in the Appendix.

The written consents of the parties to this brief have been lodged with the Clerk pursuant to Rule 37.2.[1]

ARGUMENT

In enacting the ADA, Congress found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). Congress further enunciated its sweeping purpose: "to provide a clear and comprehensive national mandate for the

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[1] No contributions were made to this brief by counsel for the parties. No monetary contributions were made other than by *amici*. Rule 37.6.

elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

The analysis employed by the U.S. Court of Appeals for the Tenth Circuit in *Sutton*, and affirmed by that Court in *Murphy*, is contrary to this purpose.

I. THE DEFINITION OF DISABILITY UNDER THE ADA IS INTENTIONALLY BROAD TO ACHIEVE THE CIVIL RIGHTS PURPOSES OF THE LAW.

The ADA was intended to cover a broad range of disabilities, and to ensure that persons with disabilities are full and equal members of our society. To achieve this goal, Congress fashioned a statute designed to protect not only those persons who have impairments that give rise to specific physical and mental limitations, but also those who have experienced such limitations in the past or who are regarded as having a disability by others.

Congress recognized that the irrational fears and misperceptions about disability can be as debilitating as the impairments themselves.[2] Thus, included within the broad class of persons protected by the Act are those who are limited and discriminated against because of the "prejudice, stereotype, or unfounded fear" of others. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

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[2] 136 Cong Rec S 7422, *S7442 (June 6, 1990) (Statement of Sen. Harkin) ("[T]he fear of epilepsy was once so great that people with this disease were believed to be possessed by the devil and were shut out of schools and the workforce. Even cancer was once thought to be contagious and resulted in discrimination.. For people with disabilities, including those with HIV disease and AIDS, the ADA offers promise that they will no longer be shunned and isolated because of the ignorance of others.").

Accordingly, Congress adopted the broad and longstanding definition included in the Rehabilitation Act of 1973, 29 U.S.C. § 794, defining disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such impairment.

42 U.S.C. § 12102(2). As this Court noted in *Bragdon v. Abbott*, this definition is drawn "almost verbatim" from the Rehabilitation Act's broad definition. 524 U.S. 624, 118 S. Ct. 2196, 2202 (1998); *see also Arline*, 480 U.S. at 285 ("the definition of 'handicapped individual' is broad"). In so adopting, Congress intended that the ADA's protections cover a wide range of types and levels of disabilities.

II. IN ENACTING THE ADA, CONGRESS ADOPTED THE COVERAGE OF THE REHABILITATION ACT AS A MINIMUM STANDARD.

Congress is presumed to know the state of the law when it passes legislation, and its use of terms which have been previously construed indicates an intent to ratify such interpretations. *Bragdon*, 118 S. Ct. at 2208. Accordingly, this Court should assume that Congress intended to codify the law of Section 504 as it existed in 1990 as the minimum level of coverage under the ADA.[3] Indeed, Section 501(a) of the ADA was adopted to ensure

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[3] In fact, the ADA was enacted to broaden civil rights protections, beyond the scope of Section 504. *Helen L. v. DiDario*, 46 F.3d 325, 331-32 (3d Cir. 1995) (analyzing ADA's legislative history).

that the courts would *not* construe the ADA to afford less protection than Section 504 of the Rehabilitation Act.[4]

A. Section 504 Case Law Protected Individuals With Mitigated Disabilities.

Section 504 case law existing at the time of the ADA's passage extended civil rights protections to numerous groups of persons with disabilities which were either wholly or partially mitigated through treatment and other measures. For example, insulin-controlled diabetes was held to be covered under Section 504 prior to the passage of the ADA.[5] Similarly, epilepsy and seizure disorders were repeatedly deemed disabilities.[6] Courts also recognized that diseases such as HIV, even in their

[4] "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 [citation omitted] or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

[5] *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982); *Davis v. Meese*, 692 F. Supp. 505, 513, 517 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) (table) ("Some insulin-dependent diabetics never experience a severe hypoglycemic occurrence, and are able to control their blood sugar levels at nearly normal levels throughout their working careers. . . . [A]n insulin dependent diabetic is clearly a 'handicapped person.'").

[6] *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (plaintiff with infrequent seizures could be disabled because persons with epilepsy face policies restricting their employment opportunities); *Mantolete v. Bolger*, 767 F.2d 1416, 1420, 1424 (9th Cir. 1985) (person with condition under "complete control" was disabled and potentially entitled to accommodation); *Akers v. Bolton*, 531 F. Supp. 300, 315 (D. Kan. 1981) (Section 504 "doubtless encompasses the class of epileptic school children"); *Drennon v. Philadelphia General Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977) ("That persons with epilepsy are considered handicapped is too self-evident to be contested.").

"asymptomatic" phases, may be disabilities.[6] Several of these decisions were cited by this Court in *Bragdon* as having correctly construed the definition of disability under Section 504. 118 S. Ct. at 2208.

The pre-ADA courts also held that recovered alcoholics and drug users are protected by Section 504.[7] Indeed, the issue was considered so well settled that this Court simply assumed that recovered alcoholics are disabled in *Traynor v. Turnage*. 485 U.S. 535, 548-49 (1988). The courts recognized that Congress intended that coverage would enable persons with drug and alcohol addictions to engage in treatment programs.[8]

By incorporating into the ADA virtually the same definition of disability contained in Section 504, Congress adopted and ratified the case law interpreting the "plain language" of that definition.

[6] *Doe v. Garrett*, 903 F.2d 1455, 1457, 1459 (11th Cir. 1990) *cert. denied*, 484 U.S. 849 (1987) ("[I]t is well established that infection with AIDS constitutes a handicap."); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1527-28, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 383 (C.D. Cal. 1987); *see also Robertson v. Granite City Com. Unit School Dist. 9*, 684 F.Supp. 1002, 1007 (S.D. Ill. 1988).

[7] *See, e.g., Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985); *Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171, 182 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987); *Wallace v. Veterans Administration*, 683 F.Supp. 758, 761 (D. Kan. 1988); *Anderson v. University of Wisconsin*, 665 F.Supp. 1372, 1391 (W.D. Wis. 1987), *aff'd*, 841 F.2d 737, 740 (7th Cir. 1988); *Traynor v. Walters*, 606 F.Supp. 391, 399-400 (S.D.N.Y. 1985) (alcoholic who had been sober 10 years was "handicapped individual").

[8] *See, e.g., Davis v. Bucher*, 451 F.Supp. 791, 796 (E.D. Pa. 1978); *Burka v. New York City Transit Authority*, 680 F.Supp. 590, 600 (S.D.N.Y. 1988).

B. Section 504 Regulations Confirm a Broad Definition of Disability.

The original Section 504 regulations, promulgated by the Department of Health, Education and Welfare in 1977, further indicate that many disabilities which can be mitigated through treatment are covered. In *Bragdon*, this Court held that "the ADA [must] . . . grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." 118 S. Ct. at 2202 (citing Section 501(a)).[9]

For example, the regulations in place since the time the ADA was enacted define "physical or mental impairment" to include numerous medical conditions which may be controlled or mitigated through treatment, including emotional or psychological disorders. 45 C.F.R. § 84.3(j)(2)(i). Further, the commentary to the regulations provides a non-exclusive list of additional examples, including hearing impairments, epilepsy, multiple sclerosis, cancer, heart disease, diabetes, drug addiction, and alcoholism. 42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. Pt. 84, App. A, p. 334 (1998).

Perhaps most tellingly, the commentary notes that federal disability nondiscrimination law should not be limited to "traditional disabilities," nor to "severe disabilities." *Id.* at 352; *see also Arline*, 480 U.S. at 280 n.5 (broad definition not limited to "traditional handicaps"). This same perspective must be brought to the ADA's definition of disability.

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[9] This Court has repeatedly held that such regulations are entitled to special deference because they were developed with the oversight and approval of Congress. *Arline*, 480 U.S. at 279-80.

III. CONGRESS STATED THAT MITIGATING MEASURES ARE NOT TO BE CONSIDERED IN DETERMINATING WHETHER AN INDIVIDUAL IS DISABLED.

The starting point for statutory analysis is the plain language of the statute itself. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). The plain language of the ADA protects an individual with a disability, defined as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2). However, the statute -- which does not define "impairment," "substantially limits," or "major life activities" -- does not specify whether a court should consider medications, prosthetic devices, or other treatments in determining whether a person has a substantially limiting impairment.

Where the text of a statute is not unambiguously clear, this Court has looked to the statute's legislative history for guidance. *United States v. Dickerson*, 310 U.S. 554, 562 (1940). In enacting the ADA, the Congress issued extensive reports detailing its intent in adopting the Act's broad definition of "disability." On numerous occasions, Congress explicitly stated that mitigating measures are not to be considered in determining whether an individual has a disability covered by the Act:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as

> epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Comm. on Educ. & Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 52 (1990); *see also* House Comm. on the Judiciary, H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 28-29 (1990) ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."); Senate Comm. on Labor & Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989).

A. The Instruction of Congress to Disregard Mitigating Measures Is Consistent with its Intent to Protect Persons with Treatable Disabilities.

Although the ADA requires an individualized analysis to determine whether a particular impairment constitutes a covered disability, Congress expressly cited in the legislative history a number of exemplary conditions that could be protected under the Act's definition, including epilepsy, diabetes, mental health conditions, cancer, HIV/AIDS, alcoholism, and heart disease.[10]

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[10] S. Rep. No. 116 at 8, 22-24, 27, 31, 39-40, 62 (1989); H.R. Rep. No. 485(II) at 51-53, 57, 62, 72, 75, 79-80, 104; H.R. Rep. No. 485(III) at 28-29, 33, 42, 44-46, 50 (1990); *see also* 136 Cong Rec E 1913, *E1914 (June 13, 1990) (Statement of Rep. Hoyer) ("Examples of impairments that substantially limit major life activities are visual or hearing impairments, mobility impairments, cerebral palsy, epilepsy, HIV infection, mental retardation, chronic schizophrenia, or heart disease.").

For example, epilepsy is cited throughout the legislative history as an example of a covered disability.[11] The use of medication to mitigate the symptoms of epilepsy is expressly noted in the reports. H.R. Rep. No. 485(II) at 52; H.R. Rep. No. 485(III) at 28, 29. Indeed, in discussing the importance of protecting individuals with epilepsy, Representative Tony Coehlo noted that "today the overwhelming majority of people with epilepsy have their physical conditions under control through medication." 135 Cong. Rec. E 1575 (May 9, 1989).[12]

Similarly, diabetes, although frequently controlled with insulin, is cited as a covered disability.[13] Psychiatric conditions are also repeatedly cited.[14] As with epilepsy and diabetes, mental illnesses are often controlled by medications.[15]

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[11] S. Rep. No. 116 at 22, 31, 39, 62; H.R. Rep. No. 485(II) at 51, 52, 62, 72, 79, 80, 104; H.R. Rep. No. 485(III) at 28, 29, 33, 42, 50.

[12] *See also* 136 Cong Rec H 2421, *H2427 (May 17, 1990) (Statement of Rep. Hoyer) ("As we all know, Tony [Coehlo]'s original career plans were stalled because of discrimination against persons with epilepsy. In the end, this was a blessing to the Nation and this House, for he might not have ended up here. But no one in this Nation has proven more than Tony Coelho that someone with a disability can be one of the most able people our Nation has ever seen.").

[13] S. Rep. No. 116 at 22, 39; H.R. Rep. No. 485(II) at 51, 52, 72; H.R. Rep. No. 485(III) at 28, 42.

[14] H.R. Rep. No. 485(II) at 51, 57, 72, 79, 104; H.R. Rep. No. 485(III) at 28, 42, 45, 46; S. Rep. No. 116 at 22, 27, 39, 62 (1989).

[15] In defending the Act's protection of qualified individuals with mental health disabilities, Senator Harkin noted the role of medications: "I am sure there are plenty of manic-depressives in this country -- I know some. I have met some who are completely controlled under doctors' orders as long as they are on prescription drugs." 135 Cong Rec S 10765, *S10765, 10766 (Sept. 7, 1989).

In addition, HIV/AIDS is referenced in the reports.[16] As extensive floor discussion made clear, asymptomatic HIV was intended to be a covered disability.[17] The critical role of medications was noted.[18]

To consider mitigating measures in determining coverage under the Act would be directly contrary to the intent of Congress to protect persons with a wide range of episodic and treatable conditions.

B. Congress Expressed a Keen Interest in Promoting Treatment for Individuals with Disabilities.

The language of a statute is to be interpreted in light of the purposes Congress sought to serve. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983). Congress repeatedly expressed an interest in promoting health, treatment and

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[16] S. Rep. No. 116 at 19, 22 ("All persons with symptomatic or asymptomatic HIV infection should be clearly included," quoting Presidential Commission on the HIV Epidemic); H.R. Rep. No. 485(II) at 48, 51, 79; H.R. Rep. No. 485(III) at 28.

[17] *See* 135 Cong Rec S 10765, *10800 (Sept. 7, 1989) (Statement of Sen. Simon) ("[T]his bill will extend protection to people with AIDS and people infected with HIV, symptomatic and asymptomatic."); 136 Cong Rec S 9684, *S9696 (July 13, 1990) (Statement of Sen. Kennedy) ("People with HIV disease are individuals who have any condition along the full spectrum of HIV infection -- asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. *These individuals are covered under the first prong of the definition of disability in the ADA* . . . .") (emphasis added).

[18] 135 Cong Rec S 10765, *S10768 (Sept. 7, 1989) (Statement of Sen. Kennedy) ("The most recent Public Health Service report that was released 2 weeks ago, has demonstrated that AZT has had a positive impact on those that have tested positive but do not have the disease. . . . [W]e have pointed out very clearly, if you are asymptomatic and HIV positive, you are protected . . . .").

recovery for individuals with disabilities through the implementation of the Act. Accordingly, the legislative history notes the importance of reasonable accommodations designed to serve this purpose.

For example, key committee reports note the importance of scheduling modifications benefiting individuals with chronic conditions:

> Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example, persons who need medical treatment may benefit from flexible or adjusted work schedules. A person with epilepsy may require constant shifts rather than rotation from day to night shifts.

H.R. Rep. No. 485(II) at 62-63; S. Rep. No. 116 at 31.

Similarly, sponsors of the Act noted the importance of anti-discrimination provisions and workplace accommodations enabling individuals with asymptomatic HIV to benefit from medications and other treatments:

> The reasonable accommodation provision of the bill will be particularly important in ensuring that people with HIV disease have the right to flexible work schedules and to time off to accommodate their treatment needs or their various disease-related conditions.[19]

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[19] 136 Cong Rec H 4614, *H4623, *H4626 (July 12, 1990) (Statements of Rep. Owens and Rep. Waxman); *see also* 136 Cong Rec S 9684, *S9696 (July 13, 1990) (Statement of Sen. Kennedy); 136 Cong Rec H 2421, *H2442 (May 17, 1990) (Statement of Rep. Weiss); 136 Cong Rec H 2599, *H2626 (May 22, 1990) (Statement of Rep.

Congress surely did not intend such modifications to be inversely tied to the success of an individual's treatment program.

Similarly, in lengthy floor debates on the Act's coverage of individuals with alcohol or drug addiction, several senators stressed the benefits of access to recovery programs, and expressly noted that the Act's protections extend to assist individuals in treatment:

> The act's protections extend to rehabilitated individuals who no longer use illegal drugs, but who continue to participate in treatment programs -- such as a methadone maintenance treatment program -- or continue to receive after-care counseling or participate in self-help groups. This reflects our recognition that these activities can be crucial to many individuals' ability to successfully sustain their recovery.[20]

In the words of Senator Moynihan, "To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax." 135 Cong Rec S 10765, *S10795.

Providing the health-promoting accommodations expressly cited by Congress would be meaningless were they were revoked once treatment became effective in controlling symptoms. Eliminating access to such accommodations "would indeed be a cruel hoax."

McDermott) (all noting importance of workplace accommodations to people with HIV).

[20] 135 Cong Rec S 10765, *S10774 (Sept. 7, 1989) (Statement of Sen. Kennedy).

IV. THE FEDERAL AGENCIES CHARGED WITH ENFORCING THE ADA HAVE STATED THAT MITIGATING MEASURES SHOULD NOT BE CONSIDERED IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY.

This Court has looked to administrative guidance issued by the Equal Employment Opportunity Commission (EEOC) and by the Department of Justice in construing the ADA. *See, e.g., Bragdon v. Abbott,* 118 S. Ct. at 2208-09. While such guidance are not controlling, they "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *Meritor Savings Bank, F.S.B. v. Vinson,* 477 U.S. 57, 65 (1986) (citations omitted), and are "entitled to deference." *Bragdon,* 118 S. Ct. at 2209.

As the federal agency charged with implementing Title I of the ADA, the EEOC has repeatedly stated that mitigating measures are not to be considered in evaluating whether an individual has a disability covered by the Act:

> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

29 C.F.R. Pt. 1630, App., § 1630.2(j).

> [T]he extent to which the impairment limits the individual's major life activities should be assessed without regard to the availability of mitigating measures. Thus, an individual who has experienced a significant loss of hearing is substantially limited in his/her ability to hear, even if the use of a

> hearing aid would improve the individual's level of hearing. Similarly, individuals with impairments (such as epilepsy or diabetes) that substantially limit major life activities are individuals with disabilities, even if medication controls the effects of the impairments. Accordingly, an individual who received dialysis treatments for polycystic kidney disease had a substantially limiting impairment, even though the disease was adequately treated through dialysis.

EEOC Compliance Manual, EEOC Order No. 915.002, Section 902, *Definition of the Term "Disability,"* pp. 35-36 (Mar. 14, 1995) (citations omitted).[21] The Department of Justice, which is responsible for implementing Titles II and III of the ADA, has followed this view.[22] The Court should defer to these agencies.

V. THE MAJORITY OF FEDERAL COURTS HAVE DISREGARDED MITIGATING MEASURES IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY.

Most federal Courts of Appeals have followed the rule stated in the legislative history and by the EEOC that mitigating measures should not be considered in determining whether an individual has a substantially limiting impairment. For example, the First and Seventh Circuits have held that individuals with diabetes controlled by insulin may be disabled under the Act. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866 (1st Cir. 1998)

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[21] *See also* EEOC Order No. 915.002, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* 6-7 (Mar. 25, 1997).

[22] 28 C.F.R. pt. 35 app. A § 35.104 (Definitions).

(plaintiff's diabetes, in its untreated state, constituted disability); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 630 (7th Cir. 1998) (truck driver with insulin-dependent diabetes raised question of fact: "That he feels 'perfectly healthy' when he is taking insulin is utterly irrelevant to the assessment of disability for the purposes of the ADA.").[23] The First Circuit has also upheld a jury verdict in favor of a plaintiff with treated depression. *Criado v. I.B.M. Corp.*, 145 F.3d 437, 442-43 (1st Cir. 1998) ("That her depression had been adequately treated through therapy in the past and was expected to be adequatedly treated through therapy and medication in the future does not establish that she does not have a disability.").

Similarly, the Third Circuit found that a maintenance supervisor with epilepsy controlled by medication raised a question of fact as to whether he was disabled. *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3rd Cir. 1997); *see also Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3rd Cir. 1998) (disregarding reasonable accommodations in finding sufficient evidence of substantial limitation in working). The Fifth Circuit found that an accountant with Adult Stills disease should be evaluated in his unmedicated state. *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 (5th Cir. 1998); *cf. Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993) (citing guidance

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[23] *See also Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (citing EEOC guidelines but finding insufficient evidence of substantially limiting impairment under that standard); *Coleman v. Keebler Company*, 997 F. Supp. 1102 (N.D. Ind. 1998) (same); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 746 (N.D. Ill. 1998) (insulin-dependent diabetes was disability); *Krocka v. Riegler*, 958 F. Supp. 1333, 1340-41 (N.D. Ill. 1997) (treated depression was disability); *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829, 834-35 (N.D. Ill. 1998) (uncorrected 20/400 vision constituted disability).

on insulin-dependent diabetes but finding plaintiff unqualified); *but see*, *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 n.3 (5th Cir. 1996) (implying disagreement with EEOC in *dicta*).

The Eighth Circut has followed the rule. *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 693 (1998) (police officer with monocular vision evaluated without regard to subconscious adjustments made by brain).[24] The Eleventh Circuit ruled that a comptroller with Graves Disease controlled by medication created a question of fact as to whether she had a disability. *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996). The Ninth Circuit has acknowledged the rule. *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1349 (1997)(citing mitigating measures guidance but finding no evidence that plaintiff's work activities were a form of treatment).[25]

Further, district courts in the Fourth, Tenth and D.C. Circuits have disregarded mitigating measures in evaluating whether an individual has a disability.[26]

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[24] *See also Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996) (applicant with vision impairment created issue of fact as to disability); *Smith v. Horton Industries, Inc.*, 17 F. Supp. 2d 1094 (D.S.D. 1998) (excluding consideration of prosthetic in deeming individual with one arm disabled).

[25] *See also Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1221 (9th Cir. 1998) (subconscious adjustments to monocular vision did not render applicant nondisabled); *Coleman v. Southern Pacific Transp. Co.*, 997 F. Supp. 1197, 1201 (D. Ariz. 1998) (excluding innate mitigating measures of the brain in finding monocular vision to be disability).

[26] *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 909 (E.D. Pa. 1997) (myopic applicants created question of fact); *Sarsycki v. U.P.S.*, 862 F. Supp. 336 (W.D. Okla. 1994) (judgment for plaintiff with controlled diabetes); *Fallacaro v. Richardson*, 965 F. Supp. 87 (D. D.C. 1997) (applicant who was legally blind without corrective lenses was disabled).

A minority of courts have rejected the Congressional and agency rule, contending that ignoring the effects of mitigating measures is inconsistent with the statutory language requiring a "substantial limitation" of a major life activity.[27] These courts disregard the unambiguous legislative history as to the meaning of this phrase, as well as significant Rehabilitation Act case law then in effect which interpreted similar language to protect individuals with treatable disabilities. Further, these courts incorrectly read the rule as eliminating the case-by-case analysis required by the Act. To the contrary, individuals must still demonstrate that their impairments, without mitigation, substantially limit one or more major life activities. Finally, these courts fail to consider the underlying purposes of the Act, which are inconsistent with rules that circumscribe protections against discrimination, or that deter access to effective treatment.

VI. EXCLUDING INDIVIDUALS WITH TREATABLE DISABILITIES FROM THE COVERAGE OF THE ADA IS CONTRARY TO ITS FUNDAMENTAL PURPOSES.

As a broad, remedial statute, the ADA must be liberally construed to effectuate its purposes. *Heilweil v. Mt.*

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[27] *Wilking v. County of Ramsey*, 983 F. Supp. 848, 854 (D. Minn. 1997) *aff'd*, 153 F.3d 869 (8th Cir. 1998); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997); *Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 (D. Kan. 1996); *Shulter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994); *see also Gilday v. Mecosta Cty.*, 124 F.3d 760 (6th Cir. 1997), at 767 (Kennedy, J., concurring in part and dissenting in part), at 768 (Guy, Jr., J., concurring in part and dissenting in part); *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080 (E.D. Okla. 1997).

Sinai Hosp., 32 F.3d 718, 722 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (describing "familiar canon of statutory construction"). The constructions employed by the courts below are contrary to the Act's remedial aims.

A. Excluding Individuals with Treatable Disabilities is Contrary to the Statute's Focus on Individuals Who are Able to Work Despite Their Disabilities.

As the Court noted in *Arline*, the ADA's broad definition of disability is appropriate, because "only those individuals who are both handicapped *and* otherwise qualified are eligible for relief." 480 U.S. at 285 (emphasis in original).

> In the context of employment discrimination, the thrust of [the Act's] purpose is essentially to protect individuals who have an underlying medical condition or other limiting impairment, but who *are* in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer.

Arnold v. United Parcel Service, Inc., 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original). In other words, it is those disabled individuals who are receiving stabilizing treatment who are more likely to be "qualified" for employment, and fall squarely among the groups protected by the Act. Accordingly, the *Arnold* court concluded that "Arnold's diabetes makes him just the type of person the ADA was designed to protect. . . . [W]ith treatment, he can perform the job despite his impairment if UPS will reasonably accommodate him." *Id.* at 862; *see also Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1134

(11th Cir. 1996), *amend. on rhg. in part by* 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2453 (U.S. 1997) ("[I]t is possible that both are true: she still suffered from these symptoms and they limited major life activities, but she was able to control them sufficiently with the help of medication to perform at work . . . .").

On the floor of the Senate, sponsor Senator Harkin reiterated the focus on whether an individual is qualified. Rather than making an individual "nondisabled" and unprotected, medication promotes protection by enabling an individual to meet standands.

> [If the disability] would affect the performance of that person's job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive or whatever it might be is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job, . . . the employee then would be able to go to the EEOC and file a complaint . . .

135 Cong Rec S 10765, *S10766 (Sept. 7, 1989). Senator Domenici made precisely the same point:

> [T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today. Certaintly you can have a disease as grave as that and fit more jobs. You are either in the process of being maintained, or we are coming close to finding a cure, or your disability is sporadic.

Id. at *S10779 (emphasis added).

Under the analysis adopted below, many individuals with treatable and episodic disabilities who are qualified inevitably find themselves unprotected by the Act. This result must be rejected as incompatible with the broad scope and purposes of the Act.

B. Excluding Individuals with Treatable Disabilities Overlooks the Real Need for Workplace Accommodations to Maintain Health.

Individuals with diabetes, seizure disorders, mental health disabilities, symptomatic or asymptomatic HIV, cancer, hepatitis, and other conditions often require workplace accommodations to maintain their health:

> Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to . . . pursue therapy or treatment for their handicaps. . . . In some instances, this may require employers to alter existing policies or procedures that they would not change for non-handicapped employees, but that is the essence of reasonable accommodation.

Buckingham v. United States, 998 F.2d 735, 740-41 (9th Cir. 1993) (citations and internal quotations omitted) (upholding transfer to obtain medical treatment). While individuals with these conditions may not be currently experiencing significant symptoms, *see Bragdon v. Abbott*, 118 S. Ct. 2196, accommodations are often needed to prevent a more active phase of their disability. Without consistent monitoring and treatment, many disabled individuals will experience a worsening of their conditions.

For example, many disabled persons require periodic visits to doctors and other health care providers.

Because most health care providers operate during business hours only, scheduling accommodations are required.[28] Similarly, some disabilities are exacerbated by working a night or split shift.[29] Assuming no undue hardship, a shift adjustment may be a reasonable accommodation.

Further, many disabled individuals with treated disabilities rely on breaks to take medications or to otherwise monitor their conditions.[30] Such breaks can enable individuals with asymptomatic HIV and other conditions to comply with complicated treatment and medication regimens, thereby maintaining health and gainful employment. Excluding individuals with mitigated disabilities would impede these results.

C. Excluding Individuals Who Mitigate Their Symptoms with Medications and Other Measures Falsely Presumes a "Complete Cure."

Excluding individuals who alleviate their symptoms with medications and other mitigating measures falsely

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[28] The EEOC has recognized that time off for doctor's appointments, breaks for monitoring medications, and shift adjustments may be reasonable accommodations. EEOC, Technical Assistance Manual (TAM), Sec. 3.10(3), p. III-22 to III-23 (Jan. 1992); *EEOC Enforcement Guidance on Psychiatric Disabilities* 24-25; *see also* 42 U.S.C. § 12111(9)(B) ("modified schedule" as accommodation).

[29] *See Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996), (summary judgment denied where clerk sought transfer after night shift aggravated depression); H.R. Rep. No. 485(II) at 62-63; S. Rep. No. 116 at 31.

[30] *See Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 856 (1st Cir. 1998) (successful control of diabetes required ongoing monitoring of glucose levels, and two to four insulin injections daily); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737 (N.D. Ill. 1998) (diabetic's request for greater access to bathroom for urination and insulin injections created triable issue of fact).

presumes a "complete cure" that is simply absent. Many individuals who rely on mitigating measures continue to experience limitations, albeit lessened, that require accommodations.[31] Further, many individuals who control their symptoms must closely monitor their conditions in ways that nondisabled people do not. Many will periodically experience difficulties with their medications triggering active symptomology and necessitating accommodations. *See Harris v. H & W Contracting, Co.*, 102 F.3d 516 (11th Cir. 1997) (change in medication caused panic attack and eight-day hospitalization for individual with Graves Disease ordinarily stabilized with medication).

Moreover, individuals undergoing treatments or taking medications for various conditions may experience side effects such as nausea or grogginess.[32] These side effects themselves may require accommodation. *EEOC Enforcement Guidance on Psychiatric Disabilities*, p. 31, question 31, example B; *see also Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2nd Cir. 1992) (finding nurse with depression disabled, and noting side effects of medication requiring accommodation); *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992) (noting side effects of medication requiring accommodation); *Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198, 200 (E.D. Penn. 1994) (job modification sought for medication side effects).

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[31] Goodwin, Frederik K. and Jamison, Kay Redfield, *Manic Depressive Illness* 597 (1990); Fisher, R.S., *et al.*, "A Large Community-Based Survey of Quality of Life and Concerns of People With Epilepsy: Part 1," 39:6 *Epilepsia* (1998).

[32] Lickey, Marvin E. and Gordon, *Medicine and Mental Illness* 129 (1991).

D. Excluding Individuals with Treatable Disabilities Would Lead to Irrational and Pernicious Results.

A statute should not be construed to mandate irrational or pernicious results. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Under the rules adopted below, an individual who relied upon an accommodation to obtain ongoing medical treatment for a disability, and thereby successful controlled his or her symptoms, would then lose the right to accommodation and be forced to discontinue treatment until the symptoms once again became active. *See Bragdon,* 118 S. Ct. at 2213-14 (Ginsburg, J., concurring) ("No rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible."). Ultimately, unemployment could result, in direct contravention of the statute's purposes.

Further, the reasoning adopted below would foster a perverse disincentive to maintaining health and controlling symptoms through measures such as medicine, diet, rest, and monitoring. *See Arnold,* 136 F.3d at 863 n.7 (Arnold "should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes under control.").

VII. THE CONCERNS OF EMPLOYERS ARE AMPLY REPRESENTED.

Giving a broad interpretation to the definition of disability does not undermine the concerns and interests of employers, which are amply protected through other provisions of the Act. For example, an individual who is not "qualified . . . with or without accommodation" for the job, or who poses a "direct threat," is not protected under

Title I of the ADA. 42 U.S.C. §§ 12111(8), 12112(a), 12113(b). Similarly, if the required accommodation would impose an "undue hardship," the employer may not be held liable. 42 U.S.C. §§ 12112(b)(5)(A), 12111(10).

That individuals are considered in their unmitigated states does not automatically mean that they are "substantially limited" in a major life activity, creating "per se" disabilities. An individual must still show that without mitigation one or more major life activity is substantially limited "in comparison to most people." S. Rep. No. 116 at 23; H.R. Rep. No. 485(II) at 52; *see also id.*("A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."); 29 C.F.R. Pt. 1630, App., § 1630.2(j) ("[A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population."). Thus, an individual who wears glasses for myopia must show that his or her visual impairment is substantially limiting compared to most people: in light of the prevalence of mild near-sightedness, an individual with low myopia is unlikely to meet this standard.

VIII. INDIVIDUAL WHO ARE DENIED EMPLOYMENT OPPORTUNITIES ON THE BASIS OF A DISABILITY ARE REGARDED AS HAVING A DISABILITY.

The definition of disability under the ADA includes multiple "prongs" designed to ensure that all individuals who experience discrimination on the basis of disability --

including those individuals with no present limitations -- are protected. Thus, in addition to protecting individuals with substantially limiting impairments, the Act protects individuals with a "record of" disability,[33] and individuals who are "regarded as" having a disability.

Although there is no reason that an individual cannot be covered under more than one "prong,"[34] the statute's structure suggests a sequential analysis as a practical matter: "An individual who satisfies this first part of the definition of the term 'disability' is not required to demonstrate thate he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition." 29 C.F.R. Pt. 1630, App., § 1630.2(j).

Under the third prong of the ADA's definition of disability, a person is disabled if he or she is "regarded as" having an impairment that is substantially limiting. 42 U.S.C. § 12102(2)(C). The provision is essential to those

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[33] *See, e.g., Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1382 (3d Cir. 1991) ("A person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities. Thus, for example, a person who has recovered from a history of mental or emotional illness, heart disease, or cancer may always be a handicapped individual under the statute.").

[34] *See Arnold*, 136 F.3d at 862 ("There is no reason this employee could not be protected under two prongs simultaneously."); Brief of the EEOC, *Graham v. Connie's Inc.*, No. 98-35242 (9th Cir.) (filed July 15, 1998), p. 17 ("Nothing in the statute suggests that the three prongs of the definition are mutually exclusive. . . . [T]he individual might qualify under both the "actual" and "regarded as" prongs of the definition, since the impairment may be substantially limiting in fact and perceived as such by the employer.").

who are not in fact substantially limited, but who face limitations imposed by the unfounded stereotypes of others.

In *Arline*, the Court interpreted identical language found in Section 504, stating:

> By includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired . . . Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284. The Court reasoned that Congress intended to protect individuals from decisions based on stereotypes and assumptions about a particular condition, rather than objective, reasoned assessments. *Id.* at 284-85.

In enacting the ADA, Congress adopted Section 504's "regarded as" language, as well as this Court's interpretation of the provision. Indeed, a thorough analysis of *Arline* is included in all three major committee reports:

> The [*Arline*] Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. . . . The Court explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

H.R. Rep. No. 485(II) at 53; H.R. Rep. No. 485 (III) at 30; S. Rep. No. 116 at 23.

Accordingly, an individual rejected from a particular job because an x-ray indicates abnormalities is "regarded as" disabled, even if the person has no outward symptoms. H.R. Rep. No. 485 (III) at 31; S. Rep. No. 116 at 24. Similarly, the "regarded as" prong protects individuals with controlled diabetes and epilepsy who are denied jobs as a "result of negative attitudes and misinformation." S. Rep. No. 116 at 24.[35] Also falling within the third prong are "people who are rejected for a particular job solely because they wear hearing aids. . .." *Id.*

Thus, under the *Arline* standard adopted by Congress in enacting the ADA, an employer that bases its employment decision on a person's actual or perceived physical or mental impairment -- whether substantially limiting or not -- regards the individual as disabled:

> A person who is . . . discriminated against [ ] because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.

H.R. Rep. No. 485(II) at 53; S. Rep. No. 116 at 24. Further, such disability-based decisions are unlawful when they are not rationally related to the individual's ability to perform

---

[35] Although Congress intended that treatable conditions be evaluated without mitigating measures as "first prong" disabilities, it conceived that such conditions also fit within the third prong. Further, those conditions that are *not* substantially limiting, even in the absence of mitigation, might be "regarded" by others as disabilities.

the job. *See Arline*, 480 U.S. at 285; H.R. Rep. No. 485 (III) at 30-31.

Any other rule would be contrary to the Act's purposes. That is, if the ADA did *not* cover individuals whose disqualification rested on their physical or mental conditions, such individuals "would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent." *Arline*, 430 U.S. at 285.

In *Sutton v. United Airlines*, 130 F.3d 893 (10th Cir. 1997), the plaintiffs presented evidence that United Air Lines disqualified them from all pilot positions because of its perception that they were unable to perform the job with their physical impairment of myopia.[36] Based on this impairment, and with no objective or reasoned assessment of actual ability to safely perform, United concluded that the applicants were unsuitable for employment as pilots. This conclusion is contrary to federal disability law, which requires employers to "replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." *See Arline*, 480 U.S. at 284-85.

Instead of evaluating United's reaction, the Tenth Circuit held that the plaintiffs "must show that the employer regarded [them] as being substantially limited in performing either a class of jobs or a broad range of jobs in

[36] Although United now asks the Court to examine the women's impairments as ameliorated by corrective lenses, under its own policy United considered these impairments in their uncorrected state, a stance that indeed emphasizes the need for "third prong" protection.

various classes." 130 F.3d at 904. Because the plaintiffs could not show disqualification from a "class of jobs," the court concluded that they were not regarded as disabled. *Id.*

Nothing in *Arline* or the ADA's legislative history suggests this narrow reading. The *Arline* Court explained that a person could be limited in working if rejected because of a particular employer's perceptions about the impairment. 480 U.S. at 283. There was no requirement that other employers would have also discriminated. In fact, the ADA's legislative history specifies precisely the opposite. *See* H.R. No. 485(III) at 30 (third prong applies "whether or not the employer's perception was shared by others in the field"). Indeed, the Tenth Circuit's analysis improperly rewards employers whose qualification standards are the *most* arbitrary.

The district court in *Murphy v. U.P.S.*, 946 F. Supp. 872 (D. Kan. 1996), *aff'd*, 141 F.3d 1185 (10th Cir. 1998), also failed to engage in the analysis dictated by *Arline* and the Congress. In accepting UPS's assertion that it did not regard the plaintiff as disabled, but as "not certifiable under DOT regulations,"[37] the court incorrectly confused the question of disability with whether Mr. Murphy was qualified for the job.[38] In so doing, the court disregarded evidence that Mr. Murphy was fired because UPS falsely

[37] In seeking a review of Mr. Murphy's DOT status and thereupon firing him without objective evidence that his impairment imposed a safety risk, UPS adopted DOT's own questionable rationale.

[38] The legitimacy of an employer's purported reliance on a safety regulation must be evaluated separately from the question of an actual or perceived disability. *Arline*, 480 U.S. at 285-86.

regarded him as having a condition that would prevent him from driving safely.[39]

CONCLUSION

In light of the fundamental purposes of the ADA, the express intent of Congress, and the body of case law decided both before and after the ADA's enactment, the Court should reverse and remand the decisions in *Sutton* and *Murphy* for an analysis of whether the plaintiffs' impairments, in the absence of mitigating measures, constitute protected disabilities.

Further, pursuant to the Court's decision in *Arline*, this Court should reverse the Tenth Circuit's conclusion that plaintiffs Sutton and Murphy were not "regarded as" disabled by the employers that rejected them.

Respectfully submitted,

Claudia Center*
Guy Wallace
Sarah Colby

Employment Law Center
A Project of the Legal Aid
Society of San Francisco
1663 Mission Street, Suite 400
San Francisco, CA 94103
(415) 864-8848

Counsel for Amici Curiae *Counsel of Record

[39] Mr. Murphy passed a physical, received a DOT Health Card, and drove UPS vehicles without incident; however, he was fired once UPS received his blood pressure results. 946 F. Supp. at 875-76.

APPENDIX

APPENDIX

AIDS Action is the national voice on AIDS, representing 3,200 of America's leading AIDS organizations and the millions of Americans affected by HIV/AIDS they serve. AIDS Action fights the AIDS epidemic by working for public policy that prevents new HIV infections, provides care for people living with HIV and AIDS, defends their rights and searches aggressively for a cure. The organization educates policy makers, corporate leaders, the national media and the public and provides leadership and support to communities affected by HIV/AIDS. As the leading AIDS policy organization, AIDS Action maintains the strongest and most effective presence on Capitol Hill on issues affecting our members and constituents.

Since 1983, the AIDS Legal Referral Panel ("ALRP") has advocated on behalf of the rights of people living with HIV and AIDS. Through its staff and panel of volunteer attorneys, ALRP has assisted in over 30,000 legal matters, helping people with HIV/AIDS to maintain healthcare, shelter, income, autonomy and freedom from discrimination. In addition, ALRP represents the interests of people with HIV/AIDS and HIV-affected communities in national public policy discussions. Throughout the history of the AIDS epidemic, ALRP's clients have included individuals who work full or part time. Some have been asymptomatic. Many more have experienced physical symptoms but have been able to work due to the ameliorative effects of complex HIV drug regimens. It is imperative for people living with HIV/AIDS who are able to work to be protected against invidious discrimination and to be given all the opportunities to succeed that are afforded to individuals who are not facing life-threatening illness on a daily basis.

AIDS Legal Services ("ALS") was founded in 1988 as a program of the non-profit, Santa Clara County Bar Association Law Foundation. ALS provides legal services to low-income individuals living with HIV or AIDS in Santa Clara County, California. The mission of ALS is to secure justice and the protection of human rights through the development, delivery, and sponsorship of specialized legal services. ALS provides representation in, among others, the areas of access to services, employment and housing. Since its inception, ALS has assisted over 2,000 individuals living with HIV or AIDS.

AIDS National Interfaith Network ("ANIN") is an organization of HIV/AIDS ministries and faith communities that mobilizes people and institutions for education, advocacy and support of persons affected by HIV/AIDS. As people of faith and action, the members of ANIN affirm the inherent worth and dignity of all persons without prejudicial regard to race, gender, age, health/physical status, sexual orientation, religious commitment, relationship status, or legal/social standing. ANIN strives to assure that all those affected by HIV/AIDS will receive compassionate care, support and assistance. HIV/AIDS is not a divine punishment. Merciful and empowering love extends to all people affected by disease, including HIV/AIDS.

The Arc of the United States ("The Arc") is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million people with mental retardation. Together, more than 1,100 state and local chapters of The Arc work to ensure that people with mental retardation can realize the opportunity to live, learn, work and play in their communities. Since its inception, The Arc has vigorously challenged attitudes and public policy based on false stereotypes that have authorized or encouraged segregation of people with mental retardation

in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act. Many people with mental retardation also have other conditions which can be ameliorated or treated through the use of medications or other measures.

The Center for Women Policy Studies is a national non-profit, multi-ethnic and multicultural feminist policy research and advocacy institution founded in 1972. In 1987 the Center founded the National Resource Center on Women and AIDS Policy and has been a leader in addressing critical AIDS policy issues from women's diverse perspectives. The Resource Center has produced more than thirty research, advocacy and policy reports since its inception, including an analysis of the Social Security Administration rules for determining eligibility for HIV-related disability in women. The Center's Metro DC Collaborative for Women with HIV/AIDS project works directly with low income women living with HIV who will be directly impacted by the ruling in this case.

The Center for Law in the Public Interest is a private, non-profit public interest law firm whose clients include individuals with disabilities, as well as groups that advocate on behalf of individuals with disabilities. In order to further the interests of these individuals, the Center engages in education, advocacy and litigation involving the Americans with Disabilities Act. The Center is active in advancing and protecting the interests of individuals with disabilities in local communities and on the state and federal levels. The issues presented by the instant cases will have significant impact on the individuals on whose behalf the Center advocates.

Disability Rights Advocates ("DRA") is a non-profit public interest law firm that specializes in class action civil

rights litigation on behalf of persons with disabilities throughout the United States. With offices in California and Hungary, DRA strives to protect the civil and human rights of people with disabilities throughout the world. DRA works to end discrimination in areas such as access to public accommodations, employment, transportation, education, and housing. In conjunction with the Disability Statistics Center at the University of California, San Francisco, DRA has published a report entitled, "Disability Watch: A Status Report on the Condition of People with Disabilities in the United States."

The Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The ELC has represented and continues to represent clients faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

The Epilepsy Foundation of America is a non-profit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. Together with its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. The term "epilepsy" evokes

stereotyped images and fears that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with seizures and has supported the development of laws that protect individuals from discrimination based on these stereotypes and fears. The Foundation is also concerned that determinations of whether a person is disabled be made without regard to mitigating measures, such as anti-epileptic medications. People whose seizures are controlled by medication are not guaranteed that their seizures will stay under control. In addition, people who achieve sustained control of their seizures must face the fact that their employers still regard them as being disabled on a daily basis.

Gay and Lesbian Medical Association ("GLMA") is an organization of 2,000 lesbian, gay, bisexual and transgender physicians, medical students and their supporters. GLMA works to maximize the quality of health care and health services for lesbian, gay, bisexual and transgender people, to promote full civil rights and to foster a professional climate in which its diverse members can achieve their full potential.

Gay Men's Health Crisis ("GMHC") is the nation's oldest and largest AIDS service and advocacy organization. GMHC serves thousands of men, women and children living with HIV/AIDS; educates the public about HIV prevention and treatment; and fights for fair and effective AIDS policy at all levels of government. The Legal Services and Advocacy Department at GMHC represents HIV-positive clients who seek protection from discrimination within the meaning of the Americans with Disabilities Act ("ADA"). As new treatments show great promise for extended health and longevity, more and more people living with HIV/AIDS

place long-range importance on the ability to obtain and retain employment, with all of its financial and psychological benefits. Many people living with HIV/AIDS need accommodations to permit them to adhere to the treatment regimens that keep them healthy enough to continue to work. Additionally, symptoms incident to the very mitigating measures that enable them to work often create the need for the ADA's protection in the first instance.

The Human Rights Campaign ("HRC") is the nation's largest lesbian and gay civil rights organization. HRC is devoted to fighting and ending discrimination against gay men and lesbians and to protecting the basic civil and human rights of those Americans. HRC is also specifically devoted to fighting discrimination against people living with HIV and AIDS. To these ends, HRC has provided federal advocacy and media and grassroots support on a range of legislative initiatives affecting gay men, lesbians, and people living with HIV/AIDS, including the Americans with Disabilities Act and the Employment Non-Discrimination Act.

The Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization which seeks to eradicate discrimination against people with mental disabilities in housing, employment and other services. The Center has advocated on behalf of many clients who have alleviated the symptoms of their conditions through therapy and medication; however, they may require periodic accommodations to their conditions which are often episodic in nature.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation,

education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns; in 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV and other disabilities, including, in part, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Co.*, 1998 WL 166856 (N.D. Ill. April 3, 1998); *School Bd. for Nassau Cty. v. Arline*, 107 S. Ct. 1123 (1987); *Chalk v. United States District Court*, 814 F.2d 701 (9th Cir. 1988); and *Raytheon v. Fair Emp. & Hous. Comm'n*, 212 Cal. App. 3d 1242 (1989). Lambda is particularly familiar with the unique barriers confronting persons with HIV and other stigmatized disabilities who attempt to secure fair treatment in the workplace.

The National Latina/o Lesbian, Gay, Bisexual and Transgender Organization ("LLEGÓ") is a national non-profit organization at the forefront of the Latina/o Lesbian, Gay, Bisexual and Transgender ("LGBT") community organizing for access to health, community development and political resources. Many of LLEGÓ's members are affected by HIV/AIDS, asymptomatic and otherwise. LLEGÓ maintains strong roots in the Latina/o LGBT communities across the United States, Puerto Rico and Latin America. More than 180 organizations and institutions comprise LLEGÓ's Network of Organizations, representing the diverse backgrounds of the Latina/o LGBT community. LLEGÓ has a proud legacy of eleven years of organizing and advocacy for individual and community empowerment.

Mental Health Advocacy Project ("MHAP") is a 20-year-old program of the Santa Clara County Bar Association Law Foundation, a California non-profit organization. MHAP's mission is to empower people affected by

psychiatric or developmental disabilities or labeled as having such disabilities to live more independent, secure and satisfying lives through the enforcement of their legal rights and the advancement of their social and economic well-being. To this end, MHAP helps over 4,000 clients per year resolve their legal problems in the areas of care and treatment, education, employment, housing, consumer rights and financial entitlements. MHAP regularly assists clients with securing vital reasonable accommodations and has first-hand knowledge about the effectiveness of reasonable accommodations in creating greater employment and housing opportunities for all individuals with disabilities.

The National Alliance for the Mentally Ill ("NAMI") is the nation's leading grassroots advocacy organization solely dedicated to improving the lives of persons with severe mental illnesses. NAMI has more than 185,000 members and 1,200 state and local affiliates in all fifty states, the District of Columbia, Puerto Rico and Canada. NAMI's efforts focus on support to persons with severe mental illnesses and their families; advocacy for nondiscriminatory and equitable federal, state, and private-sector policies; research into the causes, symptoms and treatments for brain disorders; and education to eliminate the pervasive stigma toward severe mental illnesses.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801 *et seq.*, and the Protection and Advocacy for Individual Rights Program, 29 U.S.C. § 794e, to provide legal representation and related advocacy services on behalf

of all persons with disabilities. In fiscal year 1997 alone, P&As served well over 700,000 people with disabilities through a variety of mechanisms: individual case representation, systemic advocacy, information and referral and education efforts. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance and represents their interests before the Executive and Legislative Branches of Government.

The National Center for Law and Learning Disabilities, Inc. ("NCLLD") is a non-profit corporation that seeks to promote understanding of learning disabilities ("LD"), attention deficit disorder ("ADD") and related conditions; knowledge of applicable laws; and development of appropriate policies. To achieve these goals, NCLLD provides education, advocacy, legal analysis and policy recommendations on issues affecting persons with LD/ADD. NCLLD supports the position that disability status should be determined without regard to the beneficial effects of medication, since often medication does not achieve a measurable, complete and permanent correction of the condition.

The National Center for Lesbian Rights ("NCLR"), formerly the Lesbian Rights Project, is a non-profit public interest law firm, founded in 1977 and devoted to the legal concerns and civil rights of all lesbian, gay, bisexual and transgendered persons, including those with disabilities.

The National Depressive and Manic-Depressive Association ("National DMDA") is the nation's largest patient-run, illness-specific organization. Founded in 1986 and headquartered in Chicago, Illinois, National DMDA has a worldwide, grassroots network of 275 chapters and support groups. It is guided by a 65-member Scientific Advisory

Board composed of the leading researchers and clinicians in the field of depressive illnesses.

The National Health Law Program ("NHeLP") is a national public interest firm that seeks to improve health care for America's working and unemployed poor, minorities, elderly and people with disabilities. NHeLP serves legal services programs, protection and advocacy offices, community-based organizations, the private bar, providers, and individuals who work to maintain a health care safety net for the millions of uninsured or underinsured low income people. NHeLP monitors Medicare, Medicaid and other publicly-funded health care programs; seeks remedies when laws and policies are ignored; and helps Americans receive needed medical care.

New York Lawyers for the Public Interest, Inc. ("NYLPI") is a non-profit public interest law office that works to protect the rights of people with disabilities. Through its Disability Law Center, NYLPI seeks to protect and promote the civil rights and liberties of people with disabilities and to enable them to participate fully in the mainstream of American life. NYLPI has been active on issues involving the application of the Americans with Disabilities Act ("ADA") to discrimination in employment, government services, and public accommodation. NYLPI represents individuals and files *amicus curiae* briefs on its own behalf and on behalf of disability and civil rights groups in cases around the country addressing the application of the ADA.

RESOLVE, the National Infertility Association, was founded in 1974 as a non-profit consumer organization. RESOLVE's mission is to provide timely, compassionate support and information to individuals who are experiencing infertility and to increase awareness of infertility issues

through advocacy and public education. RESOLVE's national office and its more than fifty chapters throughout the United States provide help to thousands of people experiencing the infertility crisis.

The World Institute on Disability is a private, non-profit corporation focusing on major policy issues from the perspective of the disabled community. Founded in 1983 by persons who have been deeply committed to the independent living movement, WID functions as a research center and as a resource for information, training, public education and technical assistance.

(10) (10) (8)

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

Nos. 97-1943, 97-1992 and 98-591

In The

Supreme Court of the United States

October Term, 1998

ALBERTSON'S INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

VAUGHN L. MURPHY,

Petitioner,

v.

UNITED PARCEL SERVICE,

Respondent.

KAREN AND KIMBERLY SUTTON,

Petitioners,

v.

UNITED AIRLINES, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth And Tenth Circuits

BRIEF OF SENATORS HARKIN AND KENNEDY, REPRESENTATIVES HOYER AND OWENS AND FORMER SENATOR DOLE AS AMICI CURIAE IN SUPPORT OF RESPONDENT KIRKINGBURG AND PETITIONERS SUTTON AND MURPHY

*Arlene B. Mayerson, Esquire
Chantal M. Sampogna, Esquire
Disability Rights Education and Defense Fund
2212 Sixth Street
Berkeley, CA 94710
Telephone: (510) 644-2555
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. THE DEFINITION OF DISABILITY IS BROAD IN ORDER TO ACHIEVE THE NON-DISCRIMINATION GOALS OF THE ADA 5

II. CONGRESS MADE CLEAR ITS INTENT THAT THE FIRST PRONG OF THE DEFINITION OF DISABILITY BE DETERMINED WITHOUT CONSIDERATION OF MITIGATING MEASURES 9

A. The Plain Language 9

B. Given that the Plain Language is At Least Ambiguous, The Court Should Defer to Explicit Legislative History and Authoritative Agency Interpretations 13

III. THE "REGARDED AS" PRONG OF THE DEFINITION OF DISABILITY IS INTENDED TO ADDRESS THE SUBSTANTIALLY LIMITING IMPACT OF NEGATIVE REACTIONS TO IMPAIRMENTS THAT ARE NOT OTHERWISE SUBSTANTIALLY LIMITING 16

A. Congress and the Enforcing Agencies Adopted Long Standing Agency Interpretations of the "Regarded As" Prong of the Definition of Disability 18

B. The Proper Analytical Framework 20

C. Analytical Problems with the Lower Court Decisions, as Illustrated by the Tenth Circuit Opinions 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Best v. Shell Oil, 107 F.3d 544 (7th Cir. 1997) 22

Bragdon v. Abbott, 118 S. Ct. 2196 (1998) 3, 7, 10, 15, 18

Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996) 25

Chevron, USA Inc. v. National Resource Defense Council, Inc., 467 U.S. 837 (1984) 3, 15, 16

Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988) 7

E.E. Black v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980)..... 26

Harris v. H.W. Contracting Co., 102 F.3d 516 (11th Cir. 1996) 22

Hileman v. City of Dallas, 115 F.3d 352 (5th Cir. 1997)..... 29

Holihan v. Lucky Stores, 87 F.3d 362 (9th Cir. 1996) 22

Johnson v. American Chamber of Commerce Publishers, Inc., 108 F.3d 818 (7th Cir. 1997)..... 22

Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996) 22

Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996) 28

Kirkingburg v. Albertsons, Inc., 143 F.3d 1228 (9th Cir. 1998) 1, 21

Kocsis v. Multi-Care Management, Inc., 97 F.3d 876 (6th Cir. 1996)..... 7

Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989)..... 7

Lawrence v. National Westminster Bank of N.J., 98 F.3d 61 (3d. Cir. 1996) 7

TABLE OF AUTHORITIES – Continued

Page

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Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 7

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Southeastern Community College v. Davis, 442 U.S. 397 (1984)..... 13

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Vande Zande v. Wisconsin Dept of Admin., 44 F.3d 538 (7th Cir. 1995)..... 20

Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992) 25

DOCKETED CASE

EEOC v. Joslyn Mfg. Co., No. 95C 4956, 1996 WL 400037 (N.D. Ill. July 15, 1996)..... 23

STATUES

135 Cong. Rec. S10765, S10766 (Sept. 7, 1989) (statement of Senator Harkin) 14

136 Cong. Rec. S9684-03, S9698 (1990)..... 16

28 C.F.R.
§ 35.104 19

TABLE OF AUTHORITIES – Continued

Page

29 C.F.R.
§ 1630.2 19

§ 1630, app. § 1630.2(j) para. 12 .....15, 28

45 C.F.R.
§ 84.3(j)(2)(iv) 18

Rehabilitation Act of 1973, 29 U.S.C.
§ 706(8)(B) (1988 ed.) 3, 7

42 U.S.C.
§ 12101(a)(7) 6

§ 12101(a)(5) 5

§ 12101(a)(9) 6

§ 12101(b)(1) 2, 6

§ 12102(2) 2, 6, 9, 16

§ 12102(2)(C) 4

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§ 794 (1988 ed.) 13, 18

TABLE OF AUTHORITIES – Continued

Page

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Title I, 42 U.S.C. § 12116 15

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TABLE OF AUTHORITIES – Continued

Page

Jonathon C. Drimmer, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Legislation and Social Policy for People With Disabilities*, 40 U.C.L.A. L. Rev. 1341 (1993) 16

R.S. Fisher, et al., A Large Community-Based Survey of Quality of Life and Concerns of People with Epilepsy: Part I, *Epilepsia* Vol. 39, Supp. 6 (1998) 11

A.G. Herzog, Klein P., Ransil BJ, Three patterns of catamenial epilepsy, *Epilepsia*, 1997;38:1082-1088 12

Frederick K. Goodwin M.D. & Kay Redfield Jamison, Ph.D., *Manic Depressive Illness* 597 (Oxford University Press 1990) 11

Richard S. Keefe & Phillip D. Harvey, *Understanding Schizophrenia* 437-440 (The Free Press 1994)..... 11

National Alliance for the Mentally Ill, *Understanding Manic Depression* (1997)..... 11

National Alliance for the Mentally Ill, *Understanding Schizophrenia* (1997)..... 11

N. Santilli, Selection and Discontinuation of Anti-epileptic Drugs, in *Managing Seizure Disorders: A Handbook for Health Care Professionals*, edited by N. Santilli, Lippincott-Raven Publishers, Philadelphia 1996 12

S. Schachter, Treatment of Seizures, in *The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide*. Edited by Steven C. Schachter, and Donald L. Schomer, Academic Press, San Diego 1997 12

Fuller Torry, M.D., *Surviving Schizophrenia* 189 (3d ed., Harper Collins Books 1985)..... 11

INTEREST OF AMICI*

The following Senators and Congressmen were primary authors and sponsors of the Americans with Disabilities Act and have been leaders in shaping this nation's disability policy.

Former Senator Bob Dole, a war veteran with a disability, was a key proponent of securing equal opportunity for people with disabilities during his years in the Senate, including playing a leadership role in the development of the ADA.

Senator Tom Harkin was the chief sponsor and a principal author of the ADA. As Chair of the Subcommittee on Disability Policy of the Senate Committee on Labor and Human Resources, and floor manager, he was involved in all aspects of the passage of the ADA.

Congressman Steny Hoyer was the lead House co-sponsor of the ADA. He led the House passage of the legislation and was intimately involved in all aspects of its consideration.

Senator Edward Kennedy, a principal author of the ADA, was the Chair of the Senate Committee on Labor and Human Resources during its passage.

Congressman Major Owens was Chair of the Subcommittee on Select Education of the Committee of Education and Labor during the deliberations on the ADA and was involved in all deliberations in the House.

Amici, current and former members of Congress, file this brief on behalf of the petitioners in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997) and *Murphy v. United Parcel Service*, 141 F.3d 1185 (10th Cir. 1998) and the respondent in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) in order to address the issues raised about the proper analytical framework for deciding whether an individual is "disabled" for purposes of Americans with Disabilities

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Act (ADA) coverage.[1] *Amici* are deeply concerned by the growing trend in the lower courts to use what was intended as a broad statutory definition of disability to cut off exactly the types of claims the ADA was designed to address. Closing the door at the threshold coverage stage not only denies protection to millions of Americans that Congress sought to protect but also condones exactly the conduct Congress intended to eliminate.

Amici take no position in this brief on the issues raised about job qualifications. Rather, this brief focuses on the common issue in these cases, which is that individuals who are being denied employment because of their impairments are being barred from an opportunity to demonstrate their qualifications by being stripped of coverage under the ADA. The rationale established in these cases will have a profound impact on the future viability of the ADA for individuals with a wide variety of other medical conditions – including diabetes, epilepsy, mental illness, and cancer – that Congress clearly intended to be included under the ADA's definition of disability.

SUMMARY OF THE ARGUMENT

The fundamental purpose of the ADA is "to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities" 42 U.S.C. § 12101(b)(1). This purpose has been eroded by restrictive interpretations of the threshold requirement in any ADA suit, that plaintiff be an "individual with a disability." Dismissals, often at the summary judgment stage, preclude plaintiffs who

[1] It is important to note that although the cases currently before the court arise in the employment context under Title I of the ADA, the definition of disability contained in 42 U.S.C. § 12102(2) applies to Title II (state and local governments) and Title III (public accommodations) as well. If the restrictive interpretations developed in the lower courts in Title I employment cases are sustained by this court, it will be difficult for any individual whose impairment is responsive to medication or other assistive device to bring an action under Titles II or III.

have been rejected because of their physical or mental impairments from ever having the opportunity to show that they are qualified for the job.

As this Court recently recognized in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the definition of disability in the ADA is patterned after the definition in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) In enacting the ADA, Congress was well aware that the definition was broad and not limited to traditional disabilities. Congress was guided by this Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which recognized that the breadth of the definition reflected Congress' desire to address a variety of situations where a physical or mental impairment is used to foreclose participation in the community, including working. As the Court stated: "[t]he Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments; the definition of [disability] is broad, but only those individuals who are both [disabled] and otherwise qualified are eligible for relief." *Arline* at 284-285.

The Tenth Circuit opinions in *Sutton* and *Murphy* unduly restrict the definition of disability by refusing to defer to consistent agency interpretations and legislative history which states that in evaluating whether an impairment substantially limits a major life activity, the impairment must be evaluated without regard to mitigating measures. Since the language of the statute is at least ambiguous, a court "may not substitute its own construction . . . for a reasonable [agency] interpretation." *Chevron, USA Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Indeed, an employer who refuses to consider the mitigating measure when it rejects the plaintiff based on the underlying impairment should not be able to use the success of the mitigating measure to defeat ADA coverage. Moreover, the agencies' interpretation is more in tune with the actual nature of mitigating measures. For example, while epilepsy, diabetes and mental illness are subject to mitigation through medication, the relative degree of success varies not only from

person to person, but for any given individual it depends on a number of variables. The changing nature of the effectiveness of medicines and other assistive devices over time makes an "impairment with mitigation" rule unstable and inconsistent.

If this Court decides that mitigating measures should be taken into account for purposes of determining whether an impairment is actually "substantially limiting," then an alternative basis for coverage is the "regarded as" prong of the disability definition. 42 U.S.C. § 12102(2)(C). As this Court recognized in *Arline*, Congress intended to address exclusionary practices based on medical conditions by including in the definition of disability people whose impairments are not substantially limiting, but who nevertheless are substantially limited by the "negative reactions of others to the impairment." 480 U.S. at 283. The lower courts, as illustrated by the Tenth Circuit here, have effectively repealed the "regarded as" prong by requiring that plaintiffs be actually substantially limited in order to be regarded as such. Moreover, in the employment context, courts are routinely granting summary judgment on the grounds that rejection from a "single job" does not mean that the employer regarded the plaintiff as substantially limited in working. In so doing, the courts are creating burdens for plaintiffs which are often illogical and insurmountable. The proper approach is for the employer's rejection to be given its natural meaning, which is that the employer regards the plaintiff as unable to do the tasks involved in the type of job for which the plaintiff was rejected. In most cases, this will, at a minimum, raise a genuine issue of fact as to whether the employer regarded the plaintiff as substantially limited in working.

The overly restrictive interpretations given to the definition of disability have resulted in the dismissal of ADA claims for plaintiffs with a wide variety of disabilities that Congress explicitly intended to cover. Being "disabled" within the meaning of the ADA does not mean the plaintiff wins. The plaintiff must still show that he or she was discriminated against on the basis of disability and is qualified to perform the essential functions of the job. 42 U.S.C. § 12112; 42 U.S.C. § 12111. As this Court stated in *Arline*, 480 U.S. at

284, exclusion at the coverage stage leaves these individuals "vulnerable to discrimination on the basis of mythology . . . precisely the type of injury Congress sought to prevent."

ARGUMENT

I. THE DEFINITION OF DISABILITY IS BROAD IN ORDER TO ACHIEVE THE NON-DISCRIMINATION GOALS OF THE ADA.

During congressional hearings concerning the ADA, Congress learned that employers routinely used employment criteria based on physical and mental characteristics to deprive otherwise qualified individuals of the opportunity to work.[2] The Senate Report stated:

> The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear during the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still persuasive today.[3]

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[2] The findings and purposes section of the ADA, 42 U.S.C. § 12101(a)(5) (1990) cites "exclusionary qualification standards and criteria" as a type of discrimination continually faced by people with disabilities. *See* Senate Comm. on Labor and Human Resources, S. Rep No. 116, 101st Cong., 1st Sess., at 9-10 (1989) [hereinafter Senate Report] (citing testimony enumerating major categories of job discrimination faced by people with disabilities including: use of standards and criteria that have the effect of denying opportunities; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism and acceptance by coworkers; and use of application forms and other pre-employment inquiries that inquire about the existence of disability rather than about the ability to perform the essential functions of the job).

[3] *Id.* at 37.

Congress concluded that exclusion on the basis of physical or mental impairments was not only harmful to the self-sufficiency and dignity of the individual, but to society as a whole.[4] Just as Congress sought to eradicate policies that discriminated on the basis of race and sex when it enacted Title VII of the Civil Rights Act of 1964,[5] so too did Congress seek to remove the vestiges of exclusionary, irrational policies based on physical or mental impairments when it enacted the ADA.[6]

Congress thus defined the class to be protected under the ADA broadly, defining an "individual with a disability" as a person who (a) has a physical or mental impairment that substantially limits one or more major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2). By passing through the initial threshold requirement of establishing that he or she has a disability under the ADA, however, a plaintiff has only satisfied one part of a three-part *prima facie* case

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[4] 42 U.S.C. § 12101(a)(9) ("the continuing existence of unfair and unchanging discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses from dependency and nonproductivity"); Senate Report at 16-17 ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year."); 136 Cong. Rec. S10,713 (1990) (statement of Sen. Harkin quoting Attorney General Richard Thornburgh) ("We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country").

[5] 42 U.S.C. 2000e-2 through -17 (1994); S. Rep. No. 872, 88th Cong., 2d Sess. at 23 (1964) ("The pledge of this Nation is to secure freedom for every individual" and "that pledge will be furthered by the elimination of [discriminatory] practices").

[6] Congress sought to address pervasive discrimination based on "stereotypic assumptions," 42 U.S.C. § 12101(a)(7) through a " . . . comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1).

under the ADA. The plaintiff must *also* show that he or she is qualified to perform the essential functions of the job, and that he or she was excluded from employment because of his or her disability.[7] The proper approach to this three-part *prima facie* case is to broadly interpret the definition of disability, so that a fact-specific inquiry into the individual's qualifications can be pursued.

As the Supreme Court stated in *Arline*, 480 U.S. at 284-285 (1987), about the virtually identical definition of disability under the Rehabilitation Act, "[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of handicapped individuals is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief."[8]

The unduly narrow interpretation of the definition of disability illustrated by the Tenth Circuit opinions in *Sutton* and *Murphy* perpetuates a Catch-22 that was not contemplated

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[7] *See e.g., Lawrence v. National Westminster Bank of N.J.*, 98 F.3d 61, 68 (3d. Cir. 1996); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d. Cir. 1996); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996).

[8] As this Court stated in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2201 (1998), "[t]he ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1988 ed.) . . . Congress' repetition of a well-established term carried the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." Section 504 case law consistently recognized individuals with impairments subject to mitigation or who were asymptomatic as covered by Section 504. *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (epilepsy); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (seizure disorder); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989), (insulin dependent diabetes); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989), (asymptomatic hepatitis B). *See also, Bradgon* at 2208 (listing section 504 cases covering individuals with asymptomatic HIV infection).

by Congress. Defendants are excluding individuals because of physical or mental impairments and then claiming that the rejected applicant or employee is not covered by the ADA because he or she is not disabled. In other words, the plaintiff is too disabled to do the job, but not disabled enough to be protected by the ADA.

For example, UPS argued that Mr. Murphy should not be able to claim that he was both substantially limited and qualified.[9] The Tenth Circuit affirmed the district court's view that the plaintiff should not "have it both ways" or withstand a motion for summary judgment based on "such inconsistent positions."[10] This is where the Tenth Circuit gets it exactly wrong. It was Congress' intent not to let *employers* "have it both ways". It was Congress' intent to disallow *employers* from obtaining summary judgment based on these "inconsistent positions" that motivated Congress to enact an expansive definition of disability under the ADA.

Instead of allowing the cases to proceed on the merits of whether an individual is qualified, the courts are fusing these two distinct inquiries of (1) whether plaintiff is a "person with a disability" and (2) whether the plaintiff is qualified to do the job, and penalizing plaintiffs for taking what is characterized as "inconsistent positions." The whole premise of the ADA is that individuals can be both "disabled" and able at the same time. The three prong definition of disability is not meant to be a legalistic trap but instead was drafted to convey the wide range of situations where impairment status is the subject of discriminatory action. This Court's understanding and explanation of this Congressional intent in *Arline* has been virtually ignored by the lower courts.

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[9] The District Court stated: "To demonstrate that he is disabled, Murphy sets forth several of the serious consequences which can result from his high blood pressure. Then in subsequent section of his brief, Murphy, in an effort to demonstrate that he is qualified for the position at UPS, essentially argues that his high blood pressure posed no threat or obstacle to the performance of his duties as mechanic. *Murphy*, 946 F. Supp. 872, 878 (1996).

[10] *Id.* at 878-879.

There can be no doubt that Congress did not intend medical and technological advancements which mitigate the effect of impairments enabling independence and self sufficiency to strip individuals with physical or mental conditions of protection under the first prong of the definition of disability. Moreover, Congress was not only concerned with protecting people with actual disabilities but also with prohibiting employers from using arbitrary medical criteria as the basis for excluding individuals with physical or mental impairments. The "regarded as" prong of the ADA was enacted so that employers cannot "have it both ways."

II. CONGRESS MADE CLEAR ITS INTENT THAT THE FIRST PRONG OF THE DEFINITION OF DISABILITY BE DETERMINED WITHOUT CONSIDERATION OF MITIGATING MEASURES.

The only plausible interpretation of the plain language of the ADA, the legislative history and agency interpretations is that coverage under the first prong of the definition of disability must be decided without reference to mitigating factors.

A. The Plain Language.

The first prong of the statutory definition of disability states that "[t]he term disability" means, with respect to an individual – a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The purpose of the phrase "substantially limits one or more major life activities" is to distinguish minor, trivial impairments, from those that have a significant impact on a person's life.[11] By prohibiting discrimination against people who fall within the first prong of the definition of disability, Congress intended to protect individuals with significant impairments from being discriminated against on the basis of those impairments.

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[11] As stated in the Senate Report, "Persons with minor, trivial impairments, such as a simple infected finger, are not impaired in a major life activity." Senate Report at 23; House Report (II) at 52.

The plain language of the statute simply looks at whether the impairment substantially limits a major life activity. Requiring a court to look at the impairment in its mitigated state (*i.e.*, after the individual has taken medication or used a prosthetic device) would undermine the purpose of the first prong, which is to prohibit discrimination on the basis of the impairment itself. In *Bragdon*, Justice Ginsburg stated that "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination where the disease, though present, is not yet visible." *Bragdon*, 118 S. Ct. at 2214. It would make just as little sense to prohibit discrimination on the basis of an impairment where the impairment is not ameliorated by mitigating measures, but to permit discrimination on the basis of the very same impairment simply because the individual with the impairment is taking medication or using a prosthetic device.

A rule which relies on mitigating measures is also problematic from a practical point of view. While there have been great strides in medications to help mitigate the effects of a variety of disabilities, factoring in mitigating measures adds often unpredictable and ever changing variables. Most people with conditions that rely on medication are constantly readjusting their doses and prescriptions, with more or less success. If the "disability" determination was contingent on the success or failure of mitigating measures, someone could be covered by the ADA one month and not the next.

For example, insulin, food, and exercise are mitigating measures persons with diabetes can use to achieve health and independence.[12] However, even the most stringent awareness and the most diligent balancing of these factors cannot eliminate the inherent limitations of diabetes.[13] Blood sugar levels, and, therefore, insulin needs, unpredictably respond to external forces such as stress, allergies, and illness.[14] While one

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[12] American Diabetes Association, *Medical Management of Type 1 Diabetes*, 60 (3d ed. 1998).

[13] *Id.* at 60-61, 71-72.

[14] *Id.* at 73, 77-79, 82.

may know how much insulin to administer to maintain a healthy blood sugar range in the normal course of a normal day, one cannot know how much insulin to give to ameliorate the effects of uncontrollable external forces. *Id.* at 61, 71-72, 76.

Like diabetes, mental illnesses fluctuate in severity over time.[15] Moreover, medications like Lithium for bipolar disorder and Risperdol for schizophrenia help control the most severe symptoms of these disorders, but they do not cure them.[16] In fact, it is very common for people with bipolar disorder to remain stable on Lithium for extended periods of time, only to deteriorate and require intensive interventions to stabilize their Lithium levels.[17] Moreover, psychiatric medications, particularly the more powerful psychotropics, have strong side effects that, in some instances, can be debilitating in and of themselves.[18]

Likewise, while the majority of people with epilepsy have their seizures controlled through medications,[19] there are few who can maintain complete control at all times. Approximately fifty percent of the 2.3 million people with epilepsy achieve good control through current therapies.[20] Another 30

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[15] Fuller Torry, M.D., *Surviving Schizophrenia*, 189 (3rd ed. 1985), ("Both schizophrenia and diabetes have relapses and remissions in a course which often lasts over many years, and both can be well controlled, but not cured, by drugs").

[16] National Alliance for the Mentally Ill, *Understanding Manic Depression* (1997); National Alliance for the Mentally Ill, *Understanding Schizophrenia* (1997).

[17] Frederick K. Goodwin, M.D. & Kay Redfield Jamison, Ph.D., *Manic Depresssive Illness* 597 (Oxford University Press 1990).

[18] Richard S. Keefe & Philip D. Harvey, *Understanding Schizophrenia* 437-440 (The Free Press 1994).

[19] Epilepsy Foundation of America, *Epilepsy: A Report to the Nation* (1999).

[20] R.S. Fisher, et al., A Large Community-Based Survey of Quality of Life and Concerns of People with Epilepsy: Part 1, *Epilepsia* Vol. 39, Supp. 6 (1998).

percent achieve partial control, and the rest have seizures that cannot be controlled through any current treatment.[21] There may be a period of weeks, months, or even years, where seizures are well controlled, and then seizures may recur.[22]

Breakthrough seizures, even among people on medications, can occur for any number of reasons, but commonly include illness,[23] lack of sleep,[24] hormonal or metabolic changes,[25] and changes in medications.[26] Moreover, anti-seizure medication may also cause side effects that have varying degrees of impact on individuals' daily lives.[27] Because of side effects, people with epilepsy struggle with finding the right medication, in the smallest possible dose, to maintain seizure control, while obtaining optimal functioning.[28]

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[21] *Id.*

[22] *Id.*

[23] N. Santilli, Selection and Discontinuation of Antiepileptic Drugs, in *Managing Seizure Disorders: A Handbook for Health Care Professionals*, edited by N. Santilli, Lippincott-Raven Publishers, Philadelphia 1996.

[24] Schachter, S. Treatment of Seizures, in *The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide*. Edited by Steven C. Schachter, and Donald L. Schomer, Academic Press, San Diego 1997.

[25] Herzog AG, Klein P., Ransil BJ, Three patterns of catamenial epilepsy, *Epilepsia*, 1997;38:1082-1088.

[26] Supra n.21.

[27] *Id.*

[28] Devinsky, Orrin, Antiepileptic Drug Therapy, in Guide to Understanding and Living with Epilepsy. F.A. Davis & Co., Philadelphia, 1994.

Epilepsy, diabetes, and mental illness are repeatedly referenced in the legislative history as conditions which Congress intended to cover in the ADA. (epilepsy) Senate Report at 22, 31, 39, 62, House Comm. On Education and Labor, H.R. Rep. No. 985 (II), 101st Cong., 2d Sess. at 51, 52, 62, 72, 79, 80 (1990) [hereinafter House Report (II)], House Comm. On the Judiciary, H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. at 28, 29, 33, 42, 50 (1990) [hereinafter House Report (III)]; (diabetes) Senate Report at

Just as an individual could be disabled one month and not the next, two individuals with the exact same impairment could be "disabled" or not, depending on, among other things, their level of responsibility and commitment to a medical regimen and access to good medical care. Ironically, the more disciplined individual would be unable to invoke ADA protection if discriminated against based on the underlying impairment, while the less disciplined counterpart could invoke the ADA's protections. This simply does not make sense.

The next logical step in this line of reasoning could even be that in determining coverage under the ADA, courts would have to inquire whether the effects of the impairment could be controlled if the individual was more vigilant, had a better doctor, was better educated about the consequences of failing to follow a medical regimen, etc. There is no natural stopping point in the proposition that mitigating measures should be considered in determining first prong coverage. Never would this Court have anticipated that when it stated in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1984) that "technological advances can be expected to . . . qualify [people with disabilities] for . . . employment," that those same technological advances would be used to strip plaintiffs of coverage under the ADA.[29]

B. Given that the Plain Language is At Least Ambiguous, The Court Should Defer to Explicit Legislative History and Authoritative Agency Interpretations.

When drafting the ADA, Congress explicitly considered the issue of mitigating measures, and consistent with the

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22, House Report (II) at 51-52, House Report (III) at 42; (mental illness) Senate Report at 39, 62, House Report (II) at 72, 79, House Report (III) at 28.

[29] Like *Arline*, *Southeastern* interpreted the ADA's predecessor statute, Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794 (1988 ed.).

intent that coverage be broad, concluded that mitigation should not be considered in determining first prong coverage.[30] For instance, the House Committee on Education and Labor declared that:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.
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> House Report (II) at 52.

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[30] In addition to the authoritative Committee Reports discussed below, there is also ample evidence in the legislative record that Congress intended individuals who took medicine to ameliorate the effects of impairments to be covered by the ADA. *See* 135 Cong. Rec. S10765, S10766 (Sept. 7, 1989) (statement of Senator Harkin):

> [I]f the disability would affect the performance of that person's job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive, or whatever it might be, is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job . . . [then] the employee would be able to go to the EEOC and file a complaint . . . .

See also Statement of Senator Domenici, *Id.* at 10779.

> [T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today. Certainly you can have a disease as grave as that and fit more jobs. You are either in the process of being maintained, or we are coming close to finding a cure, or your disability is sporadic.

Likewise, the House Judiciary Committee Report and the Senate Report state that the impairment "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." House Report (III) at 28, Senate Report at 23.[31]

The agencies charged with interpreting and implementing the ADA appropriately incorporated this legislative history in directing that first prong coverage be decided without regard to mitigating measures. As this Court stated in *Bragdon*, with regard to interpretations by the Department of Justice, "[a]s the agency directed by Congress to issue implementing regulations, *see* U.S.C. § 12186(b) . . . and enforce Title III in court, the Department's views are entitled to deference." 118 S. Ct. at 2209. The same can be said of the EEOC, which has been charged with the obligation to issue regulations implementing Title I, 42 U.S.C. § 12116.

Both the DOJ and EEOC interpret the first prong of the definition as requiring a determination of substantial limitation to be made without regard to mitigating measures such as medicines, or assistance, or prosthetic devices. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999); 28 C.F.R. pt. 35, app. A § 35.104; pt. 36, app. B § 36.104 (1999). Given that the agency interpretations are not inconsistent with the plain meaning of the statute and are a reasonable interpretation, considering the uncertainties of mitigation, this Court should be guided by the admonition in *Chevron, U.S.A., Inc. v.*

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[31] Much has been made of the fact the Senate Report uses the example of individuals with controlled diabetes or epilepsy to illustrate third prong "regarded as" coverage. *See* discussion of "regarded as," *infra*. The Senate Report example only serves to underscore Congress' intent to cover such individuals. First, a person with diabetes or epilepsy that is controlled with medication or diet may not be substantially limited even without such measures. Second, and most importantly, the definition of disability is fluid, so that the example can be seen as either first prong if the effects of medication are not considered or third prong if they are. All of the contortions about the appropriate prong are unnecessary. What matters is that the individual is covered by the ADA, as Congress clearly intended.

National Resource Defense Council, Inc., 467 U.S. 837, 843-44 (1984):

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, explicitly or implicitly by Congress . . . [and] a court may not substitute its own construction . . . for a reasonable [agency] interpretation . . . " (quoting *Morton v. Ruiz*, 415 U.S. 119, 231 (1974)).

III. THE "REGARDED AS" PRONG OF THE DEFINITION OF DISABILITY IS INTENDED TO ADDRESS THE SUBSTANTIALLY LIMITING IMPACT OF NEGATIVE REACTIONS TO IMPAIRMENTS THAT ARE NOT OTHERWISE SUBSTANTIALLY LIMITING.

If this Court decides that substantial limitation must be decided after consideration of mitigating measures, then the plaintiffs should be covered under the "regarded as" prong of the definition of disability. 42 U.S.C. § 12102(2). The "regarded as" prong reflects the "civil rights" approach to disability discrimination, recognizing that problems faced by people with disabilities are often not inherent to the medical condition itself, but are rather the product of ignorance and prejudice.[32] This was perfectly understood by this Court in *Arline*.[33]

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[32] As Senator Weicker testified, "people with disabilities spend a lifetime overcoming not what God wrought, but what man imposed by custom and law." 136 Cong. Rec. S9684-03, *S9698 (1990). *See*, Jonathon C. Drimmer, *Cripples, Overcomers and Civil Rights; Tracing the Evolution of Legislation and Social Policy for People With Disabilities*, 40 U.C.L.A. L.Rev. 1341 (1993).

[33] Congress adopted the Court's interpretation of the definition of disability in the ADA. House Report (II) at 53; House Report (III) at 305.

> To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." *Arline* at 279. . . .
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> . . . .
>
> . . . . By amending the definition . . . to include not only those who are actually physically impaired, but also those who are regarded as impaired, and who as a result are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. *Id.* at 284.

The entire purpose of the third prong is to provide a vehicle for examining exclusionary practices and to provide recognition that these exclusionary practices constitute substantial limitations in the lives of people with a wide variety of medical conditions. As the Supreme Court stated in *Arline*, "the basic purpose of [the statute] . . . is to ensure that [disabled] individuals are not denied jobs or other benefits because of the prejudicial attitudes or ignorance of others." *Id.* at 284.[34] Instead of giving credence to the breadth of the third prong, courts are creating burdens of proof for plaintiffs which are often illogical and insurmountable. Most troubling is the overuse of summary judgment to cut off ADA claims at the threshold coverage stage.[35]

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[34] In *Arline*, the Court quoted an *amicus* brief of the Epilepsy Foundation of America for the proposition that "[a] review of the history of epilepsy provides a salient example that fear rather than the handicap itself is the major impetus for discrimination against persons with handicaps." 480 U.S. at 285 n.13.

[35] *See*, Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendents*, 34 Harvard Civil Rights – Civil Liberties Law Review 99,

A. Congress and the Enforcing Agencies Adopted Long Standing Agency Interpretations of the "Regarded As" Prong of the Definition of Disability.

Congress patterned the ADA's "regarded as" prong on regulations implementing Section 504 of the Rehabilitation Act of 1973. *See Bragdon*, at 2202 (noting that Congress adopted previous regulatory interpretations of Section 504 when it enacted the ADA). As the House Judiciary Report explains,

> The ADA uses the same "regarded as" test set forth in the regulations implementing Section 504 of the Rehabilitation Act. Those regulations provide:
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

House Report (III) at 29 citing 45 C.F.R. 84.3(j)(2)(iv).

Congress explicitly relied on the rationale articulated by this Court in *Arline* for an understanding of the meaning and scope of the "regarded as" prong.

> The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*. [480 U.S. 273 (1987).] The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as

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110 (1999) (courts have misused the summary judgment rules to the disservice of plaintiffs in ADA employment cases).

> disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

Senate Report at 23; House Report (II) at 53; House Report (III) at 30.

The Section 504 regulation was adopted by both the EEOC and the Department of Justice in their ADA regulations. 29 C.F.R. § 1630.2; 28 C.F.R. § 35.104. The interpretive guidance to the EEOC and DOJ regulations tracks the committee reports. 29 C.F.R. pt. 1630; app. § 1630.2; 28 pt. 35, app. A § 35.104 pt. 36, app. B § 36.104, respectively.

Accordingly, the "regarded as" prong is (1) intended to cover individuals who do not satisfy the requirements of the first two prongs of the definition of disability under the ADA, and (2) is meant to acknowledge that the negative reactions of others can be just as "substantially limiting" as the impairment itself. In other words, the third prong is intended to address societal barriers to full participation based on physical or mental impairments.

Courts, however, have had trouble reconciling the label "disabled" with an individual who is functioning well enough to work and take part in community events. Yet, this is exactly what Congress intended. As Judge Posner explained,

> Disability is broadly defined. It includes not only "a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled] individual," but also the state of 'being regarded as having such an impairment.' The latter definition, although at first glance peculiar, actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied

> employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995). It is necessary to provide an analytical framework for enforcing the "regarded as" prong which gives effect to Congress' purpose.

B. The Proper Analytical Framework.

It is useful to remember that the definition of disability is generic to the ADA, not attached to the specific provisions of any one Title. Therefore, it is necessary to develop an analytical framework that will work for all the Titles of the statute. It is helpful to first look at Title III, which covers public accommodations, because in the employment context the analysis often gets muddled and confused by issues related to qualifications for the job.

Under Title III, if a bakery refused service to an individual with facial scars, the bakery would be regarding the individual as disabled. It would not matter if there were other bakeries that would serve the person, or whether the baker thought that eating bakery goods was a major life activity. The prejudice of the baker is the limitation the third prong is meant to address. If the individual can establish that the bakery refused to serve the individual because of his facial scars, that would be sufficient to establish a *prima facie* case of discrimination under the third prong.[36] Cf. House Report (III) at 30. ("For example, severe burn victims often face discrimination in employment and participation in community

[36] The Department of Justice, in its section-by-section analysis to its regulations implementing Title III, adopts the view that a rejection based on disability by a public accommodation invokes the third prong of the definition of disability. The Department of Justice states:

> which results in substantial limitation of major life activities.")

The question raised by *Sutton*, *Murphy*, and *Kirkingburg*, is how the third prong analysis should work in a Title I case. The legislative history indicates that when an applicant or employee is rejected from a job because of the individual's physical or mental impairment, there is at least a factual question as to whether the employer regarded the individual as being substantially limited in a major life activity, including working. The Senate Report gives as an example of individuals covered by the third prong "people who are rejected for a particular job for which they apply because of findings of a back abnormality on an x-ray."[37]

The Judiciary Report confronts the issue directly, stating:

> Thus, a person who is rejected from a job because of myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.[38]

To underscore Congress' broad interpretation of coverage, the Judiciary Report states:

> It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on a basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff qualifies for coverage under the "regarded as" test.[39]

[37] Senate Report at 24.

[38] House Report (III) at 30.

[39] House Report (III) at 30-31.

Using this analysis, the EEOC cites concerns related to productivity, safety, insurance, liability, attendance, cost, accommodation, accessibility, worker's compensation costs or acceptance by co-workers and customers as examples of stereotypes, fears or misconceptions about disabilities.[40] The EEOC concludes that if an employer makes an adverse employment decision based on beliefs or fears that a person's perceived disability will cause problems in any of these areas, and the employer cannot show a legitimate nondiscriminatory reason for the action, the individual would be covered under the third prong of the definition.[41]

Too often, however, in the employment context, the lower courts are granting summary judgment to defendants, with the rationale that rejection from a "single job" is not enough to show that the employer regarded the rejected applicant or employee as substantially limited in the major life activity of working, or in any other major life activity.[42] At

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[40] 29 C.F.R. pt. 1630, app. §1630.2(1) (1999); EEOC *Technical Assistance Manual* at II-11.

[41] *Id.*

[42] Fortunately, some of the circuit courts are beginning to vacate such dismissals, recognizing that in most instances the issue of whether the employer regarded the plaintiff to have a disability is a question of fact. *See Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819-20 (7th Cir. 1997) (leaving issue of whether defendant was regarded as having disability for lower court on remand); *Best v. Shell Oil*, 107 F.3d 544, 549 (7th Cir. 1997) ("[A] trier of fact could find that [defendant] perceived [plaintiff] as having a disability that prevented him from working"); *Harris v. H.W. Contracting Co.*, 102 F.3d 516, 524 (11th Cir. 1996) (finding question of fact still exists with respect to "regarded as" prong); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 955 (3d Cir. 1996) ("[I]t is clear that a reasonable fact-finder could infer that [defendant] perceived [plaintiff] to be disabled"); *Holihan v. Lucky Stores*, 87 F.3d 362, 366-67 (9th Cir. 1996) (holding that lower court erred in granting judgment as matter of law because the evidence could support finding that defendant regarded plaintiff as having disability); *Katz v. City Metal Co.*, 87 F.3d 26, 33-34 (1st Cir. 1996) (finding evidence created

least part of the problem appears to stem from a misapplication of the EEOC's regulations, which define substantially limited in the major life activity of working as

> "significantly restricted in the ability to perform either a class of jobs, or a broad range of jobs in various classes as compared to the average person having comparable training, skill, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

Hence, in a case under the *first* prong of the definition of disability, the plaintiff must allege that his/her impairment actually restricts him/her from performing a "class of jobs."[43]

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genuine issue of material fact with respect to "regarded as" prong); *See also EEOC v. Joslyn Mfg. Co.*, No. 95C 4956, 1996 WL 400037, at *7 (N.D. Ill. July 15, 1996) ("[I]n order to survive summary judgment, the [plaintiff] only need raise a genuine issue of facts as to whether [the plaintiff's] perceived impairment substantially limited his ability to work, not actually prove as much.").

[43] The "single job" exception has also been interpreted too broadly by lower courts, to defeat first prong coverage. *See* Robert L. Burgdorf, *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment; Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409 (1997).

> The exclusion-from-one-job-is-not-enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with, among others, the following kinds of impairments: replacement of hips and shoulders (as a result of a vascular necrosis); diabetes; cancer; laryngectomy (removal of larynx); hemophilia; heart attack; absence of one eye; degenerative hip disease resulting in a limp; permanent severe limitations in use of the right arm and shoulder; various serious back injuries; depression and paranoia; a six-inch scar on the face resulting in supervisors calling the employee "scarface; 'bilateral carpal tunnel syndrome;' " asthma; asbestosis; HIV infection; traumatic brain injury resulting in vision limitations, memory deficiencies, problems with verbal fluency, problems

However, under the third prong, a plaintiff is alleging that he/she *can* perform the class of jobs represented by the job in question. Therefore, the plaintiff will not be able to demonstrate, nor would he or she have any interest in demonstrating, that he or she is precluded from the class of jobs involved. In most cases, the only evidence which will be available to plaintiff is the rejection by the defendant. It is not the rejection per se which gives rise to the "regarded as" claim, but the natural and ordinary implication of such a rejection. Usually, if an employer rejects an individual from a job because of the individual's impairment, it means the employer thinks the individual's impairment precludes the individual from doing the types of tasks the job requires. Therefore, in most cases, a rejection based on a medical condition raises, at a minimum, a material issue of fact as to whether the employer "regarded" the individual as "disabled" within the meaning of the ADA.

Summary judgment on the definition issue is inappropriate, except in cases where there is no conceivable set of facts from which a trier of fact could conclude that plaintiff was "regarded as" substantially limited in working or in any other major life activity. Self serving statements by a defendant that it did not regard the plaintiff as so limited cannot be the basis of summary judgment when the natural and predictable implication of the adverse treatment is otherwise.

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abstracting and motor deficits; and stroke resulting in the loss of use of the left hand, arm and leg. (footnotes omitted)

For case cites *see id.* at 539-541 nn.643-661.

C. Analytical Problems with the Lower Court Decisions, as Illustrated by the Tenth Circuit Opinions.

The mistakes of the lower courts are illustrated by the Tenth Circuit opinion in *Sutton*,[44] where the court:

1. Required, in essence, that plaintiffs be actually substantially limited (1st prong) in order to establish a "regarded as" case; and
2. Required that the plaintiffs demonstrate that the employer regarded them to be disqualified from similar jobs by other employers.

Both of these requirements, often combined, constitute insurmountable obstacles for plaintiffs.[45] Since an employer is only concerned with the particular job it is offering, it is not likely to be thinking about other jobs the impaired individual could or could not obtain and certainly is not thinking about how the plaintiff's impairment affects other activities besides working. The only way to give meaning to the "regarded as" prong is to interpret the rejection from the job in question to signify the employer's view of the plaintiff's ability to perform the class of jobs to which the job in question belongs.

Yet, employers are being allowed to defend suits under the ADA by proving that other employers do not utilize the same discriminatory criteria as that employed by the defendant and that, therefore, the discriminatory criteria does not constitute a substantial barrier to employment.[46] In other

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[44] The *Sutton* decision provides a more thorough analysis of the "regarded as" prong than *Murphy*.

[45] *See e.g., Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (rejecting plaintiff's "regarded as" claim because he was not substantially limited in major life activity).

[46] *See Burgdorf* at 441, 456, n.234; *see e.g., Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996). (In a case involving rejection as a fire fighter because of hemophilia, where the court refused to consider the policy of the city to require all EMT and paramedic positions to meet firefighting

words, the more arbitrary and prejudicial the physical or mental criteria, the more likely the employer will be able to escape review under the ADA.[47] This argument would be untenable in other areas of civil rights law, where proof of other employers' nondiscriminatory job criteria would be used as evidence of the defendant's discrimination.

The Tenth Circuit opinion in *Sutton* illustrates how both the infusing of first prong analysis in "regarded as" cases and requiring a plaintiff to demonstrate the employer's perception beyond the natural implications of the rejection itself undermines the "regarded as" prong. In determining whether United "regarded" plaintiffs as unable to do a class of jobs, the court immediately shifted its inquiry to the first prong analysis of whether plaintiffs' impairment actually substantially limited their employment in a "class of jobs". *Sutton* at 903-904. The Court then concluded that if the plaintiffs are not substantially limited in working in actuality, they also cannot be found to have been regarded as substantially limited. This judicial construction effectively repeals the third prong of the definition.

The court also improperly applies the "single job" exception in the EEOC regulations defining "substantially limited in working" to the "regarded as" analysis. Although the Tenth Circuit accepts plaintiffs' allegations that United rejected

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standards in consideration of whether plaintiff was excluded from a "class of jobs" because there was no proof that other employers did the same thing.)

[47] The case which gave rise to the "class of jobs" analysis recognized that in "evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process," *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1100 (D. Hawaii 1980). The court in *E.E. Black* underscored the importance of a presumption of common usage of the discriminatory criteria. *Id.* Otherwise, according to the court, an employer using the "aberrational type of job qualification . . . would be rewarded if his reason for rejecting the applicant were ridiculous enough." *Id.*

them from all pilot jobs at United the court concludes that this rejection is not sufficient to demonstrate rejection from a "class of jobs," which would include not only global airlines, such as United, but all other types of carriers as well (national, commuter, regional, cargo/courier airlines). However, the court gives absolutely no indication as to how plaintiffs are to demonstrate whether or not United regarded them as able or unable to work for the other types of airlines. The court simply states that it cannot adopt a "reasoning [that] would imply that anyone who failed to obtain a single job because of a single requirement of employment could become a "disabled individual . . . This reading would stand the Act on its head." *Sutton* at 905.

As the Sixth Circuit stated in *Taylor v. United States Postal Service*, 946 F.2d 1214, 1218 (6th Cir. 1991),

> . . . a per se rule that never permitted an unsuccessful job applicant to prove he was perceived as being handicapped by pointing to the fact that he did not possess a so-called job requirement due to physical impairment would likewise stand the Act on its head. How else would a person who, for example, had a cosmetic disfigurement ever prove that he was handicapped under the Act except by pointing to the fact that an employer did not hire him for that reason?

In most cases, the plaintiff will only know that the employer rejected him or her because of an impairment. Absent contrary evidence, the rejection from the job in question must be viewed as a perception that the plaintiff is unable to perform the class of jobs of which the particular job is a part. For example, if an employer rejects an applicant for a teaching job because of an impairment, the applicant is regarded as unable to teach. Plaintiffs' allegation that there is nothing unique about the United pilot jobs should suffice to establish that United regarded plaintiffs (or all those with

uncorrected vision of 20/100 or worse) as unable to perform the class of jobs of piloting.[48]

Moreover, since plaintiffs were rejected because of their *uncorrected* vision, United cannot claim that it did not regard them as substantially limited in seeing because they can wear glasses. It would be unfair to look at the "regarded as" prong with mitigating measures that the defendant refused to consider in the rejection.

The Tenth Circuit's results-oriented approach can perhaps be explained by the courts' fundamental misunderstanding of the significance of finding that plaintiffs were "regarded as" disabled under the ADA. Immediately after rejecting plaintiffs' "regarded as" claim, the court cited *Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996) for the proposition that accepting plaintiffs' claim would mean that "anyone could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual. . . . "

The fundamental misunderstanding revealed by this quote is the assumption that establishing *coverage* is sufficient to establish a *prima facie* case. As stated earlier, the coverage question is just the first prerequisite of a *prima facie* ADA case.[49] The plaintiff must also show that he or she is qualified to perform the essential functions of the job and that

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[48] The Tenth Circuit references the EEOC's example that "an individual who cannot be a commercial pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working," 29 C.F.R. §1630, app. §1630.2(j) para. 12. This example is used to explain whether, under the first prong of the definition of disability, an individual is actually substantially limited in working. Again, as explained above, in a "regarded as" case the allegation that United rejected plaintiffs from all pilot positions with United must be interpreted to at least raise a factual issue that United regarded plaintiffs as unqualified for pilot jobs in general.

[49] *See infra.*

the rejection was based on disability. As the Supreme Court warned in *Arline*, 480 U.S. at 285, by excluding an impaired individual from coverage, the individual loses the opportunity to have the condition evaluated in light of medical evidence, thus making him or her "vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent."

Another insight into the Tenth Circuit's restrictive interpretation of coverage is revealed in the Court's statement that "[w]e refuse to construe the . . . The Act as a handout to those who are in fact capable of working in substantially similar jobs." *Sutton* at 906. *Citing Hileman v. City of Dallas*, 115 F.3d 352, 354 (5th Cir. 1997). Coverage under the ADA is not a hand-out. The fact that an individual *might* be able to find work elsewhere should not shield an employer from having its exclusionary medical criteria evaluated in light of objective medical evidence. As was emphasized time and time again in the legislative history of the ADA, "[b]y including the phrase 'qualified individual with a disability' the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. . . . " Senate Report at 26. "An employer may still devise physical and other job criteria and tests for a job so long as the criteria and tests are job related and consistent with business necessity." *Id.* at 27.

ADA plaintiffs want to work; they want to be tax-paying, contributing members of our society. Courts are accustomed to the term "disability" meaning "inability" in cases for benefits and tort awards. The ADA provides a new framework for the term disability. The third prong of the definition, in particular, is causing confusion because it uses the term "disabled" to describe people whose biggest limitation is the attitudes of others. *Amici*, current and former members of Congress, look to this Court to set forth the proper analytical framework for the lower courts, to give effect to Congressional intent to eliminate attitudinal barriers which limit the

opportunities of millions of Americans with a wide range of medical conditions.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals for the Tenth Circuit should be reversed and the judgment of the Court of Appeals for the Ninth Circuit affirmed.

Dated: February 19, 1999

Respectfully submitted,

ARLENE MAYERSON
Disability Rights Education &
Defense Fund
2212 Sixth Street
Berkeley, California 94710
Telephone: (510) 644-2555

(12)

Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

No. 97-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, *et al.*,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

ROBERT P. WARREN
DAVID A. BERG
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004-1707
(202) 626-4000

JOHN J. GALLAGHER
Counsel of Record
KENNETH M. WILLNER
NEAL D. MOLLEN
MARGARET H. SPURLIN
PAUL, HASTINGS, JANOFSKY & WALKER LLP
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004-2400
(202) 508-9500

Counsel for Amicus Curiae Air Transport Association of America, Inc.

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TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Interests of the *Amicus Curiae* 1

Summary of Argument 2

Argument 6

I. Individuals Who Have 20/20 Vision When Wearing Corrective Lenses Do Not Have Disabling Impairments Within The Meaning Of The ADA 6

A. The Commonplace Physical Trait Of Nearsightedness Is Not An Impairment Under The ADA 7

B. Only Individuals Who Actually Suffer Substantial Limitations In Major Life Activities Are Disabled Within The Meaning Of The ADA 9

C. Correctable Visual Acuity Problems Are Not Substantially Limiting Disabilities . 14

II. United Airlines Did Not "Regard" Petitioners As Disabled Simply Because They Did Not Meet High Selection Criteria 17

Contents

	Page
III. Air Carriers Have An Obligation Under The Federal Aviation Act To Operate With The Highest Degree Of Safety	20
A. Safety Is The Essence Of An Airline's Business	20
B. The Minimum Licensing Standards Of The Federal Aviation Administration Do Not Define The Limits Of Carrier Safety Obligations	22
C. Vision Standards Adopted By The FAA And ATA's Members Are An Inseparable Part Of Their Respective Safety Programs	24
Conclusion	27

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	27
Aucutt v. Six Flags Over Mid- America, Inc., 85 F.3d 1311 (8th Cir. 1996)	13
Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998)	12, 13
Cantrell v. Nashville Electric Service, 1999 U.S. App. LEXIS 1207 (6th Cir. Jan. 21, 1999)	13
Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994)	12
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	11
Collier v. City of Dallas, 798 F.2d 1410 (5th Cir. 1986)	12
Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2d Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1164)	19
Coupe v. Federal Express Corp., 121 F.3d 1022 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1300 (1998)	21

Cited Authorities

	Page
Deas v. River West, L.P., 152 F.3d 471, 476, 481 (5th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3438 (U.S. Dec. 30, 1998) (No. 98-1057)	19
Dole v. United Steelworkers of America, 494 U.S. 26 (1990)	11
EEOC v. American Airlines, 48 F.3d 164 (5th Cir. 1995)	21
Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998)	16
Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986)	14
Gutridge v. Clure, 153 F.3d 898 (8th Cir. 1998)	13
Harrington v. Rice Lake Weighing Sys., Inc., 122 F.3d 456 (7th Cir. 1997)	19
Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1996)	10
Heilweil v. Mt. Sinai Hosp., 32 F.3d 718 (2d Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995)	14, 16
Johnson v. American Airlines, 745 F.2d 988 (5th Cir. 1984)	21
Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996)	13

Cited Authorities

	Page
Lorillard v. Pons, 434 U.S. 575 (1978)	27
MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996)	16
Martinson v. Kinney Shoe Corp., 104 F.3d 683 (4th Cir. 1997)	13
Matthews v. Commonwealth Edison Co., 128 F.3d 1194 (7th Cir. 1997)	13, 20
McKay v. Toyota Motor Mfg., 110 F.3d 369 (6th Cir. 1997)	13, 14
Murnane v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982)	21, 23
Perkins v. St. Louis County Water Co., 160 F.3d 446 (8th Cir. 1998)	13
Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997)	13
Robinson v. American Airlines, 908 F.2d 1023 (1990)	23, 25
Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995)	14
Sharon v. Larson, 650 F. Supp. 1396 (E.D. Pa. 1986)	12

Page

Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019 (7th Cir. 1997) 13

Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972) 21, 22

Stone v. City of Mount Vernon, 118 F.3d 92 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998) 13

Swanks v. WMATA, 116 F.3d 582 (D.C. Cir. 1997) . 13

Tardie v. Rehabilitation Hosp. of Rhode Island, 1999 U.S. App. LEXIS 2877 (1st Cir. Feb. 24, 1999) .. 19

Thompson v. Holy Family Hosp., 121 F.3d 537 (9th Cir. 1997) 13

Webb v. Garelick Mfg., 94 F.3d 484 (8th Cir. 1996) 16

Western Airlines v. Criswell, 472 U.S. 400 (1985) 4, 20, 21, 24

Williams v. Channel Master Satellite Sys, Inc., 101 F.3d 346 (4th Cir. 1996) 13

Witter v. Delta Air Lines, Inc., 138 F.3d 1366 (11th Cir. 1998) 17, 18

Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) 14

Zirpel v. Toshiba Am. Info. Sys., Inc., 111 F.3d 80 (8th Cir. 1997) 16

Page

Statutes:

42 U.S.C. § 12101(a)(1) 8

42 U.S.C. § 12101(a)(6) 14

42 U.S.C. § 12101(7) (1994) 2

42 U.S.C. § 12101(8) (1994) 2

42 U.S.C. § 12102(2)(A) 6

49 U.S.C. § 44701(b) (1998) 20, 22

49 U.S.C. § 44701(d) (1998) 22

Other Authorities:

14 C.F.R. § 61.23 (1998) 25

29 C.F.R. § 1630.2(h) App. (1998) 6, 7

29 C.F.R. § 1630(h)(1) 8

29 C.F.R. § 1630(j) App. 8

29 C.F.R. § 1630.2(j) App. 11, 12, 16

29 C.F.R. § 1630.2(j)(3)(ii)(B) 17

Cited Authorities

	Page
29 C.F.R. § 1630.2(j)(3)(ii)(C)	17
29 C.F.R. § 1630.2(l) App.	12
29 C.F.R. § 1630.2(r) App.	24
46 C.F.R. § 10.205	26
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INTERESTS OF THE *AMICUS CURIAE*[1]

The Air Transport Association of America, Inc. ("ATA"), is a membership organization of twenty-three U.S. certificated air carriers. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. carriers and employ over half a million people, including more than 50,000 pilots.[2] ATA's members have a vital interest in the safety of commercial air transportation; they are required by the Federal Aviation Act to observe the "highest possible degree of safety" in their operations. The Federal Aviation Administration adopts minimum licensing standards for pilots, but the construction of the Americans With

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1. Petitioner and Respondent have consented to the filing of this brief and their consent letters are filed herewith. United Airlines is a member of ATA, but no counsel for a party has authored this brief in whole or in part and no party has made monetary contribution to the preparation or filing of this brief.

2. ATA regularly represents the interests of its member carriers in legislative, judicial and administrative matters. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a broad variety of aviation-related issues. ATA also works closely with the various Federal agencies that regulate the airline industry such as the Federal Aviation Administration and the Department of Transportation. ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

Disabilities Act ("ADA") urged by the Petitioners threatens to turn these licensing minimums into an industry-wide ceiling on hiring standards. ATA and its members are concerned that this construction would displace the Federal Aviation Act's safety imperative without an express statement from Congress that it intended such a far-reaching result.

Because the Federal Aviation Act and its implementing regulations impose upon ATA's members an affirmative obligation to operate with the highest possible level of safety, each carrier has a particular interest in the degree to which courts and juries applying laws unrelated to aviation such as the ADA may be permitted to adjust the qualifications/safety calculus performed by airlines when hiring individuals for safety-related positions. The ATA is uniquely suited to provide the airline industry perspective regarding the interrelationship between the important commands of these two statutory regimes. Accordingly, ATA files this brief as *amicus curiae* in support of the Respondent.

SUMMARY OF ARGUMENT

1. The American with Disabilities Act ("ADA" or "the Act"), was enacted by Congress to address the "political powerlessness [of the disabled] in our society" and encourage the "full participation, independent living, and economic self-sufficiency [of] such individuals." 42 U.S.C. §§ 12101(7) and (8) (1994). The Act was designed to "bring persons with disabilities into the economic and social mainstream of American life." H. R. Rep. No. 101-485(II), at 22-23 (1990), *reprinted in* 1990 U.S.C.A.A.N. 303, 304. Congress believed that the disabled are "uniquely underprivileged and disadvantaged, much poorer, much less well-educated, and have much less social life" than the non-disabled, *id.* at 31,

and that "discrimination [against the disabled has] result[ed] in dependency on social welfare programs" costing American taxpayers billions of dollars. *Id.* at 43.

Petitioners are nearsighted. Because they wear corrective lenses, they function with 20/20 vision. This does not render them "uniquely underprivileged and disadvantaged," and there can be no suggestion that the nearsighted as a class are now, or have ever been, "political[ly] powerless[] in our society." Those who rely on eyeglasses do not need the assistance of Congress in order to the join the "economic and social mainstream of American life"; nor are they disproportionately dependent on social welfare programs. Petitioners have a commonplace shortcoming that is entirely eliminated by corrective lenses. This is not a condition the ADA was designed to address.

2. A disability discrimination claim under the ADA depends upon proof that the plaintiff is "substantially limited in one or more major life activities." Petitioners' Amended Complaint admits that they are not so limited. Once Petitioners put on their corrective lenses, they each have perfect 20/20 vision. Thus, neither of the Petitioners is *actually* limited in what she can do in any substantial way by her eyesight.

Because the Petitioners suffer from no actual, real-world limitation in their daily activities attributable to their eyesight, Petitioners and their *amici* insist that the Court assess their "disabled" status by *ignoring* their *actual* capacities, and instead theorize about what might be true if the Petitioners had no corrective lenses. The EEOC argues, in its brief and in its non-binding "interpretive guidance" to the ADA, that a person who takes medication, uses a device, or employs some

other mitigating strategy which eliminates *entirely* the deleterious impact of an ailment may nonetheless be "disabled." This argument is based solely on the hypothesis that the plaintiff *would* be "substantially limited" *if only* he or she stopped using the mitigating measures. Thus, in the EEOC's view, the "substantiality" inquiry required by the ADA is not an assessment of *actual* limitations in major life activities, as Congress plainly intended, but an exercise in hypothetical projections. This "what if" analysis is inconsistent with the statute's plain language and would dramatically expand the number of Americans eligible to sue under the ADA.

3. Airlines impose stringent hiring standards for safety-related positions — standards which necessarily are far more stringent than those applicable to virtually all other jobs in the national economy. The airlines set these hiring standards because the Federal Aviation Act requires air carriers to observe the very *highest* degree of safety. The Federal Aviation Administration ("FAA") sets minimum safety standards for licensing pilots, but air carriers are encouraged to establish standards higher than the FAA's if the carrier determines in its own judgment that those higher standards will foster a higher degree of safety in the context of their own operations. This federal mandate distinguishes the airline industry from nearly all other workplaces in the national economy.

> The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution .... The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound."

Western Airlines v. Criswell, 472 U.S. 400, 419-20 (1985) (citation omitted). For this reason, the Court should be reluctant to adopt the dubious textual reading of the ADA urged by Petitioners, a reading which fails to recognize or accommodate the congressional safety mandate applicable to commercial airline pilots who are responsible for the lives of millions of Americans every day. A construction of the ADA which gives jurors the final voice in determining questions of airline safety undermines the Federal Aviation Act's safety mandate.

The unavoidable, practical consequence of the Petitioners's construction of the ADA would be a single, industry-wide set of hiring standards — set at the lowest common denominator (*i.e.*, the FAA minimums) — in contravention of the Federal Aviation Act's statutory design. ATA believes that if the ADA is applied as it is written — as Congress intended — there is no inconsistency between the commands of the Federal Aviation Act and the ADA. Because Petitioners are not "substantially limited" in their daily life activities by their visual acuity, and because there are only a relative handful of jobs in the national economy for which their vision might make them uncompetitive, they are not disabled as defined in the ADA. Nonetheless, the unique regulatory environment in which airlines operate underscores the danger of giving the ADA an expansive interpretation — unwarranted by its explicit terms — that would empower any court or jury to review each airline hiring decision under its own idiosyncratic notion of "the highest possible degree of safety."

Petitioners' contention that there are no safety dimensions to the standards adopted by United is simply wrong. The FAA applied an "uncorrected vision" standard for more than 30 years (even after the passage of the ADA), and similar

standards are currently imposed by the Air Force and Navy for their pilots. It cannot be impermissible under federal law for an airline like United, operating on the basis of its own good faith judgment, to adopt a hiring standard that is currently, and lawfully, imposed by the federal government itself for similar safety-sensitive positions. If the view of the ADA urged by Petitioners is adopted, the threat of case-by-case litigation with individuals like Petitioners, who are not disabled, would create a perverse incentive for airlines to lower their hiring standards to the FAA's minimums, turning those regulatory minimums into industry maximums contrary to Congress's explicit statutory design.

ARGUMENT

I.

INDIVIDUALS WHO HAVE 20/20 VISION WHEN WEARING CORRECTIVE LENSES DO NOT HAVE DISABLING IMPAIRMENTS WITHIN THE MEANING OF THE ADA

An individual is "disabled" under the ADA if she has "a physical or mental impairment that substantially limits [her in] one or more . . . major life activities." 42 U.S.C. § 12102(2)(A). Petitioners' poor eyesight is not an impairment; it is merely a common "physical characteristic" placing Petitioners "within [the] 'normal' range" of physical capacities shared by other Americans. 29 C.F.R. § 1630.2(h) App. (1998). Moreover, even if Petitioners' poor eyesight is an "impairment," it does not "substantially limit" them in any major life activity. Petitioners claim that they are disabled because they could not see properly or work effectively if they did not wear corrective lenses. They do, however, wear corrective lenses, and when they do, they are not, in fact, limited in their ability either to work or to see. The plain

language of the statute demands an assessment of the Petitioners' actual capacities; it requires proof that the Petitioners' ability to engage in "major life activities" *is* "substantially limited," not in theory but in fact. Because there is no such allegation in their Amended Complaint, the district court properly dismissed this lawsuit.

A. The Commonplace Physical Trait Of Nearsightedness Is Not An Impairment Under The ADA

The term "impairment" is not defined in the text of the ADA. The regulations, and the EEOC's interpretative guidance regarding the ADA, however, explain that physical characteristics or attributes "within the normal range" of common human experience are not impairments:

> It is important to distinguish between conditions that are impairments and physical . . . characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone *that are within "normal" range and are not the result of a physiological disorder*.

29 C.F.R. § 1630.2(h) App. (emphasis added).[3]

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3. By including changeable characteristics such as weight and muscle tone in the quoted language, the EEOC disposes of any contention that the "normal range" limitation applies only to immutable characteristics such as height. The reference to a "physiological disorder" at the end of the quoted passage is circular surplusage. The ADA does not define the term "disorder," but Webster's defines it as "an *abnormal* physical or mental condition." *Webster's Third New Int'l Dictionary* at 652 (Merriam-Webster 1981) (emphasis added). Thus, a condition within the "normal range" cannot be a disorder.

Petitioners wear corrective lenses to correct imperfect vision, like more than 100 million other Americans, and therefore fit well within the "normal range."[4] Indeed, a U.S. Department of Health & Human Services study found that nearly two-thirds of adults wear corrective lenses.[5] Because Congress enacted the ADA on the premise that "some 43 million have one or more . . . disabilities," 42 U.S.C. § 12101(a)(1), it is self-evident that Congress did not believe that the 100 million Americans who use glasses to work, read, or drive are "disabled" or suffering from an impairment.[6]

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4. *See A National Plan 1999-2003: A Report of the National Advisory Eye Council*, U.S. Department of Health and Human Services, Public Health Service, National Inst. of Health and National Eye Inst., at 7.

5. *See Eye Care Visits and Use of Eyeglasses or Contact Lenses* 29, Vital & Health Statistics Series 10, No. 145 (1984); *accord* U.S. Dept. of Health & Human Servs., *Office Visits to Ophthalmologists and Other Physicians for Eye Care Among the U.S. Population* (1995). The EEOC claims that only those with severe nearsightedness would be covered by the ADA, but the distinction is a meaningless one in the substantial limitation inquiry Congress devised. Contacts or glasses are both necessary and freely available to correct simple nearsightedness, whether the individual's eyesight is 20/50 or 20/400. If the vision problems are fully and easily correctable, they have no "effect on the life of the individual," regardless of how poor the *uncorrected* vision might be. 29 C.F.R. § 1630(j) App.

6. The EEOC's entire argument on the "impairment" issue is contained in this sentence:

> Petitioner's poor vision is a "physical . . . impairment" that satisfies the regulatory definition of the term, *i.e.*, a "physiological disorder *or* condition, . . . affecting . . . special sense organs." 29 C.F.R. § 1630(h)(1).

(Cont'd)

B. Only Individuals Who Actually Suffer Substantial Limitations In Major Life Activities Are Disabled Within The Meaning Of The ADA

Petitioners do not — and could not — contend that individuals with fully correctable visual acuity problems actually suffer substantial limitations in their real-world ability to perform major life functions. Indeed, they affirmatively allege that "with corrective measures, [each of them] function[s] identically to individuals without a similar impairment." J.A. 24. By definition, if an individual's acuity problems are fully corrected through the use of glasses or contact lenses, that individual can see, read, work, or drive as well as someone who does not need corrective lenses to achieve 20/20 vision.

Because Petitioners admit that they suffer from no actual, real-world limitation, they argue that the "substantial limitation" inquiry should ignore their daily reality in favor of a speculative "what-if" analysis. According to Petitioners and the EEOC, in an ADA case, the court must ignore a plaintiff's *actual* capacities and premise its disability determinations on a projection of what life for the plaintiff would be like in the *absence* of the mitigating measures the plaintiff actually uses.

(Cont'd)
EEOC Br. at 7 (emphasis added). With the definition excerpted in this way, eye color would be an impairment, *i.e.*, a "condition affecting special sense organs." The EEOC's definition, therefore, fails to account for Congress' evident desire that "minor, trivial impairments" would not be covered by the ADA. S. Rep. No. 101-116 (1989), *reprinted in* H.R. Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Public Law 101-336, at 121 (Comm. Print 1990).

Thus, under the EEOC's construction of the ADA, former President George Bush — who signed the ADA into law — would be disabled because he suffered from Graves Disease.[7] To eliminate the disease, President Bush had his thyroid chemically destroyed, and he takes — and will take for the remainder of his life — a daily dose of replacement hormone. *Id.* If President Bush ever failed to take his daily medication, he could lapse into a coma or die,[8] but because he *actually* takes the hormone, his physician reports that he is in "excellent physical health, . . . jogging [and] conducting all of his business without any side effects from his medication and without any lingering problems from his . . . Graves disease."[9] To the EEOC, it is simply irrelevant that President Bush does not *actually* suffer from a substantial limitation in any major life activity, because if, hypothetically, he ever failed to take his medication, he *would* be so limited.

The language of the ADA cannot bear the EEOC's construction: a disability is an "impairment *that substantially limits* [an individual in] one or more major life activities," not one which might, under some (absent) circumstances, cause such a limitation.[10] The text of the ADA demands an

7. *See Bush Starts Daily Thyroid Medication*, Washington Post, July 10, 1991, at A2.

8. *See Harris v. H&W Contracting Co.*, 102 F.3d 516, 522 (11th Cir. 1996) (taking judicial notice that Graves disease, although entirely controlled in that case, "is capable of substantially limiting major life activities if left untreated by medication" and noting the potential effects in the absence of treatment).

9. *Bush Starts Daily Thyroid Medication*, Washington Post, July 10, 1991, at A2.

10. There are, of course, impairments which can be controlled only partially through the use of medications or other assistive (Cont'd)

inquiry into *actual* limitations, not hypothetical ones.[11] As the EEOC has recognized,

(Cont'd)
devices. When presented with such a case, a court would be obligated under the ADA to determine whether the residual limitations of the medicated condition are "substantial," as the statute requires. Similarly, the side effects of certain medications or devices might themselves impose substantial limitations; the Court need not decide in this case whether or how these side effects may be relevant to the ADA inquiry. Finally, there may be circumstances in which a plaintiff has refused to use available mitigating measures. In a case of that sort, the putative plaintiff may well not be "qualified" as required by the statute, but the Court need not decide that issue here; the Petitioners affirmatively allege that they use corrective lenses and that, as a result, they function with 20/20 vision.

11. The briefs of the EEOC and the Petitioners rely almost entirely on the EEOC's interpretive guidance and the assertion that the agency's interpretations are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Even if the EEOC's interpretations are the functional equivalent of regulations, as Petitioners argue (and they are not for the reasons given by the court of appeals), *Chevron* deference is not warranted here because the agency's interpretations are, in relevant part, flatly contradicted by the terms of the statute. *See, e.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 43 (1990). The applicable terms of the ADA explicitly demand an assessment of the plaintiff's *actual* limitations, rather than conjecture about possible or theoretical ones; this case of statutory construction does not require deference to the EEOC. Moreover, the guidance is internally inconsistent. In it, the EEOC declares that conditions like appendicitis and broken bones are not disabilities because they are "temporary [and] non-chronic," 29 C.F.R. § 1630.2(j) App., but they can be classified as "temporary" conditions only if the impact of mitigating measures is considered; left untreated, a broken leg or an infection like appendicitis might well render an individual "substantially (Cont'd)

> [m]any impairments do not impact an individual's life to the degree that they constitute disabling impairments. . . . The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, *but rather on the effect of that impairment on the life of the individual.*

29 C.F.R. § 1630.2(j) App. (emphasis added). A fully corrected medical condition, by definition, *has* no real "effect . . . on the life of the individual" and therefore cannot be a disability.[12] *See Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct.

(Cont'd)
limited in one or more major life activities." Similarly, the guidance explains that an individual who "has *controlled* high blood pressure" might be "regarded as" disabled if his employer viewed him as disabled even though otherwise the controlled condition had no significant impact on the individual's ability to engage in major life activities. 29 C.F.R. § 1630.2(l) App.

12. Petitioners assert that when Congress passed the ADA, it implicitly approved of prior case law under the Rehabilitation Act. Pet. Br. at 24-25. ATA, however, has been unable to find a single Rehabilitation Act case holding that nearsightedness corrected to 20/20 is a disability. Petitioners claim that *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986), is on point, but it is not. The case involved a myopic person whose vision was corrected with biopic lenses. The plaintiff, however, retained a significant blind spot around the central image. It was because of the central blind spot, not the level of uncorrected vision, that the court treated the plaintiff as handicapped. In *Collier v. City of Dallas*, 798 F.2d 1410 (5th Cir. 1986), *cited in Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994), the court held that vision correctable to 20/20 was not an impairment.

2196, 2206 (1998) (while ADA does not require demonstration that plaintiff is utterly incapable of performing a major life activity, it does require that there be an actual, substantial limitation; finding that HIV infection substantially limited the plaintiff in the major life activity of reproduction because "respondent [testified] that her HIV infection controlled her decision not to have a child").

The lower courts have been careful to confine the sweep of the ADA to cases involving truly *substantial* limitations.[13]

13. *See, e.g., Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997) (heart disease); *Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) (heart disease); *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997) (epilepsy); *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019 (7th Cir. 1997) (blindness); *Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997) (spina bifida); *Stone v. City of Mount Vernon*, 118 F.3d 92 (2d Cir. 1997) (paraplegia), *cert. denied*, 118 S. Ct. 1044 (1998). In contrast, courts have concluded that many permanent or chronic conditions are not disabilities or handicaps protected by the ADA or Rehabilitation Act because they have an insufficient impact on major life activities. *E.g., Perkins v. St. Louis County Water Co.*, 160 F.3d 446 (8th Cir. 1998) (Meniere's disease, which results in infrequent vertigo and vomiting, is not a disability); *Cantrell v. Nashville Electric Service*, 1999 U.S. App. LEXIS 1207 (6th Cir. Jan. 21, 1999) (allergy to hydraulic oil); *Gutridge v. Clure*, 153 F.3d 898, 900-91 (8th Cir. 1998) (carpal tunnel syndrome with lifting restrictions); *Williams v. Channel Master Satellite Sys, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (25-lb. lifting limit not a disability), *cert. denied*, 520 U.S. 1240 (1997); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (same); *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997) (25-pound lifting restriction for registered nurse does not substantially limit a major life activity); *Price v. Marathon Cheese Corp.*, 119 F.3d 330 (5th Cir. 1997) (carpal tunnel syndrome is not substantially limiting because plaintiff was able to do other jobs); *McKay v. Toyota Motor*

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Adopting the rule urged by Petitioners and the EEOC would distort the ADA — a statute designed to improve the lot of "a discrete, specific minority"[14] occupying "an inferior status in our society"[15] — into a cause of action available to nearly every working American to challenge any unfavorable employment decision. Authorizing such an unjustified expansion of the definition of "disability" would "debase [the] high purpose" of the statute. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (Rehabilitation Act case).

C. Correctable Visual Acuity Problems Are Not Substantially Limiting Disabilities

As explained in the preceding section, any inquiry into "the effect of [an] impairment on the life of [an] individual" necessarily will include an assessment of the effectiveness of mitigating measures. Correctable vision problems are a prime example. While the legislative history suggests that Congress understood "the term [disability to] include[] . . . visual . . . impairments . . ." S. Rep. No. 101-116 (1989), *reprinted in* H.R. Comm. on Education and Labor, 101st

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Mfg., 110 F.3d 369, 373 (6th Cir. 1997) (carpal tunnel syndrome); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (carpel tunnel syndrome and tendinitis); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454-56 (7th Cir. 1995) (strabismus); *Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718, 722 (2d Cir. 1994) (asthma), *cert. denied*, 513 U.S. 1147 (1995); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) (acrophobia).

14. H.R. Rep. No. 101-485(II), at 40, *reprinted in* 1990 U.S.C.A.A.N. at 322.

15. 42 U.S.C. § 12101(a)(6).

Cong., 2d Sess., Legislative History of Public Law 101-336, at 324 (Comm. Print 1990), this does not mean that Congress considered every vision problem, including commonplace, correctable nearsightedness, to be a "disability." Rather, the legislative history repeatedly refers to vision problems that substantially impair an individual's ability to work or see *even with* mitigating measures. For example, the Senate Committee report's list of "reasonable accommodations" notes that

> [f]or blind and visually-impaired persons . . . [an employer may be obligated to provide] adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

S. Rep. No. 101-116 (1989), *reprinted in* H.R. Comm. on Education and Labor, at 130. The words "glasses" and "contact lenses" are notably absent from this list.

Because Petitioners' corrective lenses give them 20/20 vision, they are not in any sense substantially limited in the major life activity of seeing. Petitioners argue, however, that United's vision standards render them substantially limited in the major life activity of working. The claim is refuted even by the EEOC interpretive guidance on which Petitioners so heavily rely:

> [A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess, or talent. *For example, an individual who cannot*

> *be a commercial airline pilot because of a minor vision impairment, but who can be a . . . pilot for a courier service, would not be substantially limited in the major life activity of working.* [An individual is not disabled simply because he or she cannot] perform either a particular specialized job or a narrow range of jobs.

29 C.F.R. § 1630.2(j) App. (emphasis added).[16]

In this case, Petitioners are alleged to be "experienced commercial pilots" who currently fly planes in passenger service for other airlines. J.A. 17, 19. They acknowledge that "other airlines [do] not share United's" hiring standards. Pet. Br. at 8. Thus, they do not allege that they are precluded from working as commercial airline pilots.[17] At most, Petitioners have alleged that they do not meet United's hiring standards. As even the EEOC recognizes, this is not sufficient.[18]

16. *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996) (taxiing an aircraft is not a "class of jobs" but a single job duty that is not necessarily part of being a mechanic); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 805 (5th Cir. 1997) (plaintiff who wears pacemaker who cannot work as expediter at B&W facility is not substantially limited in working), *cert. denied*, 118 S. Ct. 1050 (1998); *Heilweil v. Mount Sinai Hosp..*, 32 F.3d 718, 723 (2d Cir. 1994) (asthmatic disqualified from only a narrow range of jobs is not handicapped), *cert. denied*, 513 U.S. 1147 (1995); *Webb v. Garelick Mfg.*, 94 F.3d 484 (8th Cir. 1996) (plaintiff with focal dystonia not disabled because he could work in occupations not involving handwriting and repetitive hand motions).

17. Petitioners describe the "class" of jobs from which United's rule excludes them as "global airline pilot." J.A. 25.

18. *See Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (as a matter of law, plaintiff's panic disorder did not

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II.

UNITED AIRLINES DID NOT "REGARD" PETITIONERS AS DISABLED SIMPLY BECAUSE THEY DID NOT MEET HIGH SELECTION CRITERIA

Petitioners also contend that United "regarded [them] as having" an "impairment that substantially limits them" in the major life activity of working. J.A. 9. To establish a claim under this ADA provision, the Petitioners would have to show that United actually regarded them: (1) as having an impairment; (2) which substantially limits them in working in "either a class of jobs or a broad range of jobs in various classes." *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369-70 (11th Cir. 1998); *see also* 29 C.F.R. § 1630.2(j)(3)(ii)(C).

Petitioners claim that United regarded them as unfit for the self-defined "class of jobs" called "global airline pilot." J.A. 25. That claim was properly rejected by the court of appeals. First, Petitioners have attempted to define themselves into a cause of action by inventing their own "class of jobs." "A 'class of jobs' consists of jobs in the geographic area in which the plaintiff resides that utilize 'similar training, knowledge, skills, or abilities' ". *Witter*, 138 F.3d at 1370, *quoting* 29 C.F.R. § 1630.2(j)(3)(ii)(B). "Global airline pilot" is not a legitimate job title, much less a proper label for a "class of jobs." Petitioners' own experience as pilots definitively demonstrates that they are capable of using their training, knowledge, skills, or abilities as pilots to fly

(Cont'd)
substantially limit her in the major life activity of working where she had "had three jobs since her discharge, and she currently holds a . . . position nearly identical to the one she held" with defendant).

passengers in revenue service with a variety of other airlines. Moreover, as the Eleventh Circuit held in *Witter*, when a pilot brings a disability case, the appropriate class of jobs includes

> [s]uch jobs [as] pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.

Id. at 1370.

Moreover, it is indisputable that United knew: (1) that the current FAA minimum vision standards permitted Petitioners to get a first class certificate from the FAA; (2) that Petitioners were, at the time, working for other carriers as commercial airline pilots; and (3) that Petitioners' eyesight would be acceptable under the hiring standards applicable at a variety of other airlines. Thus, when it applied its own hiring standards in rejecting Petitioner's applications, United knew only that there were better-qualified candidates available for its pilot vacancies, positions for which the competition is fierce and the requirements are exacting.

Petitioners seem to argue that their "regarded as" claim can survive without any allegation that United believed that they *actually* were excluded from a whole class of jobs — even the class of jobs as they define it — so long as they allege that United believed that other carriers hypothetically *should* have excluded them. The argument shares the same disdain for reality as Petitioners' anti-textual reading of the substantial limitation inquiry; it ignores the plain language of the statute, which specifically requires an *actual* — not a

hypothetical — substantial limitation of a major life activity.[19] Because United knew that Petitioners could meet the minimum vision standards imposed by the FAA and the hiring standards of other air carriers, United did not regard Petitioners as possessing an impairment that substantially limits their ability to find employment as a pilot. United

---

19. *See, e.g., Tardie v. Rehabilitation Hosp. of Rhode Island*, 1999 U.S. App. LEXIS 2877 (1st Cir. Feb. 24, 1999) (employer who perceived that plaintiff with heart condition was unable to work more than 40 hours per week did not regard plaintiff as disabled because a person who cannot work more than 40 hours per week is not substantially limited in a major life activity); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998) ("It is not enough, however, that the employer regarded that individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled within the meaning of the ADA. [citation omitted] Thus, in order to prevail, the plaintiffs were required to adduce evidence that the County regarded each officer as having an impairment that substantially limited a major life activity. This the officers failed to do."), *pet. for cert. filed*, 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1164); *Deas v. River West, L.P.*, 152 F.3d 471, 476, 481 (5th Cir. 1998) ("to have made a prima facie showing of disability, Deas must have produced sufficient evidence for a reasonable trier of fact to conclude that Dr. Dixon perceived her as having an 'impairment' and that this impairment, if it existed as perceived by Dr. Dixon, would have substantially limited one or more of Deas' major life activities"; "Dr. Dixon's belief that Deas was incapable of fulfilling the essential functions of an 'addiction technician' in a hospital substance abuse treatment unit does not establish that she regarded her as being substantially limited in her ability to work in general"), *pet. for cert. filed*, 67 U.S.L.W. 3438 (U.S. Dec. 30, 1998) (No. 98-1057); *Harrington v. Rice Lake Weighing Sys., Inc.*, 122 F.3d 456, 460-61 (7th Cir. 1997) ("The notion that Rice Lake must have fired Harrington because it regarded him as disabled and that it plainly regarded him as disabled because it fired him is attractive but circular — it lacks a causal antecedent.").

rejected their applications,[20] but there is no allegation that United regarded Petitioners as unemployable as commercial pilots elsewhere — or even substantially limited in their employment opportunities.

III.

AIR CARRIERS HAVE AN OBLIGATION UNDER THE FEDERAL AVIATION ACT TO OPERATE WITH THE HIGHEST DEGREE OF SAFETY

A. Safety Is The Essence Of An Airline's Business

The Federal Aviation Act requires commercial air carriers to operate with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b). In *Western Air Lines v. Criswell*, 472 U.S. 400 (1985), this Court described safety as the "essence" of the air carrier's function, and observed that

> [t]he uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case. The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a

20. An employer is entitled to choose the most able among qualified candidates, even where the unsuccessful candidate's relative shortcomings are attributable to an actual disability. *See e.g.*, *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (Posner, C.J.). For the reasons described above, Petitioners' relative shortcomings do not amount to, or stem from, an actual disability.

> tragic accident would prove that the judgment was sound."

Id. at 419-20 (citation omitted). As the D.C. Circuit earlier observed in a pilot hiring case, *Murnane v. American Airlines*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982):

> [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the *airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely. . . . Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.*

Id. at 101 (emphasis added).[21]

21. *See also Coupe v. Federal Express Corp.*, 121 F.3d 1022, 1025 (6th Cir. 1997) ("We know, moreover, that [operating with] the 'highest degree of safety in the public interest' is 'reasonably necessary' to Federal Express's aircraft operations — for Congress has said so"), *cert. denied*, 118 S. Ct. 1300 (1998); *EEOC v. American Airlines*, 48 F.3d 164, 170-71 (5th Cir. 1995) (quoting with approval *Murnane*'s conclusions regarding court's inability to second guess carrier's standards when related directly to operational safety); *Johnson v. American Airlines*, 745 F.2d 988, 993 (5th Cir. 1984) (holding that "[c]ourts simply do not possess the expertise with which to supplant [the airline's] judgment" with respect to safety issues), *cert. denied*, 472 U.S. 1027 (1985); *Spurlock v. United Airlines*, 475

(Cont'd)

B. The Minimum Licensing Standards Of The Federal Aviation Administration Do Not Define The Limits Of Carrier Safety Obligations

The Federal Aviation Act distinguishes expressly between the air carriers' obligation to maintain the *highest* standard, and the FAA's lesser obligation to set "*minimum*" standards. 49 U.S.C. §§ 44701(b), (d) (1998). As explained in the FAA Air Transportation Operations Inspector's Handbook, the higher standard to which a carrier is held obligates the carrier to take safety precautions irrespective of the FAA's minimum standards:

> The FAA . . . has the duty, as authorized by 49 U.S.C., subtitle VII, § 40101, ["Aviation Programs"] to establish *minimum* standards, rules, and national policy which provide adequately for national security and safety in air commerce. . . .
>
> 49 U.S.C. § 44701 specifies that, when prescribing standards and regulations and in issuing certificates, the FAA shall give full consideration "to the duty resting upon air operators to perform their services with the *highest* possible degree of safety in the public interest . . ." In other words, 49 U.S.C. charges the FAA with the responsibility of promulgating and enforcing *adequate* standards and regulations. At the same time, 49 U.S.C. recognizes that holders of air operator certificates have a direct responsibility of providing air transportation with the *highest* possible

(Cont'd)
F.2d 216, 219 (10th Cir. 1972) ("risks involved in hiring an unqualified applicant [as an airline pilot] are staggering"; the "public interest clearly lies in having the most highly qualified persons available to pilot airliners").

> degree of safety. The meaning of 49 U.S.C. § 44701(b), should be clearly understood. *It means that this duty (or responsibility) rests directly with the air operator, irrespective of any action taken or not taken by an individual FAA inspector or the FAA.*

FAA Air Transportation Operation's Inspector's Handbook, DOT publication no. 8700.10 CHG 16, at 2-8 (Dec. 22, 1997) ("FAA Handbook") (emphasis added).[22] Federal courts have held that the Federal Aviation Act encourages air carriers to set standards higher than the minimums promulgated by the FAA:

> [T]hat American [Airline's medical] criteria exceed the FAA's minimum requirements is irrelevant. An airline is free to impose more stringent requirements, and "must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*."

Robinson v. American Airlines, 908 F.2d at 1023 (*quoting Murnane*, 667 F.2d at 101) (emphasis in original).

The position advanced by the Petitioners and the EEOC threatens this framework. The EEOC suggests that the Court should effectively ignore the "substantial limitation" inquiry demanded by the ADA because an airline might rely on its vision standard later in the case in arguing that a particular candidate was unqualified or posed a "direct threat" to her

22. *See also* FAA Handbook at 2-8 (FAA "has the duty to establish minimum standards . . ."; "safety standards applicable to air transportation (air carriers) are more stringent than standards applicable to persons or organizations not involved in common carriage").

own safety or the safety of others. EEOC Br. at 12. The EEOC's suggestion is grounded in the dubious premise that the risks and costs of case-by-case litigation should not be a concern to air carriers. To the contrary, the prospect of continuous litigation with disappointed applicants who are not actually disabled would create a perverse incentive for airlines to lower their hiring standards to the FAA's minimums, effectively turning those regulatory floors into a ceiling contrary to Congress's explicit statutory design. Moreover, mounting a "direct threat" defense would require an airline to shoulder the difficult, and perhaps impossible, burden of proving that lower hiring standards would pose a "high probability of substantial harm,"[23] *i.e.*, to "run[] the risk until a tragic accident [would] prove that [its hiring standard was] sound." *Criswell*, 472 U.S. at 419-20. Absent express direction from Congress that it intended to displace the FAA's longstanding safety regime, the Court should give primacy to the mandate of public safety while simultaneously giving a sensible reading to the ADA and its animating principles.

C. Vision Standards Adopted By The FAA And ATA's Members Are An Inseparable Part Of Their Respective Safety Programs

From 1962[24] until 1994, the FAA measured the visual

23. 29 C.F.R. § 1630.2(r) App.

24. Federal air safety regulations, including the uncorrected vision standards, were first codified under the aegis of the Federal Aviation Administration in 1962. These standards actually extended back even further in time as regulations of predecessor agencies. *Medical Standards and Certification*, 27 Fed. Reg. 7980 (1962).

acuity of an applicant for a first- or second-class airman medical certificate based on his or her *uncorrected* vision.[25] The FAA's benchmark standard — in place for over 30 years as an FAA requirement — was adopted by many air carriers as their own standard, and is the standard in effect at United Airlines at issue in this case.[26]

In 1982, FAA began a review of all of its medical standards for airmen and enlisted the American Medical Association (AMA) to provide professional and technical guidance. *Review of Medical Standards and Certification Procedures*, 47 Fed. Reg. 30,795 (1982). The AMA report, issued on March 26, 1986, recommended that the FAA *retain* its reliance on an uncorrected vision standard.[27] Nevertheless,

25. A pilot flying for a commercial carrier such as United must have a first class medical certificate. 14 C.F.R. § 61.23 (1998).

26. Petitioners correctly point out that some carriers treat applicants and incumbents differently with respect vision standards. That, however, does not make the hiring standard irrational, as Petitioners assert. As the D.C. Circuit observed in *Robinson v. American Airlines*, carriers rely on this applicant/incumbent distinction on the entirely reasonable premise that

> pilots who are familiar with [an airlines'] unique safety procedures by virtue of their experience in [that airline's] cockpits, but who might no longer meet all of its initial-hire medical criteria, present less of an overall safety risk than new pilots who, while meeting the initial medical standards, are unfamiliar with [the airline's] safety procedures.

Id. 908 F.2d at 1023.

27. A.L. Engelberg and T.C. Doege, *Review of Part 67 of the Federal Air Regulations and the Medical Certification of Civilian Airmen*, vol. 1, p. I-7 (Amer. Medical Ass'n 1986). For the Court's convenience, a copy of the AMA report has been lodged with the Clerk's office.

eight years later, in 1994, the FAA eliminated its minimum standard for uncorrected vision, not on the basis of any scientific or statistical data, but to "administratively simplify[ ] the certification process."[28]

Thus, the uncorrected vision benchmark relied upon by United in this case is no antiquated relic, as petitioners suggest; it was used by the FAA well after the passage of the ADA. Moreover, other federal agencies charged with issuing and administering safety standards continue to apply similar benchmarks. Both the Navy and Air Force rely on an "uncorrected vision" standard for their pilots,[29] and the Department of Transportation uses an "uncorrected" vision standard for licensing certain merchant marines. 46 C.F.R. § 10.205. When Congress enacted the ADA, federal agencies

28. *Revision of Medical Standards and Certification Procedures*, 59 Fed. Reg. 53,226, 53,232 (1994). Prior to 1994, the FAA had entertained applications for waivers of its vision standards for pilots who could achieve the required minimum vision standard through spectacles or contact lenses. To reduce the administrative burden of considering and granting exceptions, from 1986 to 1994, the FAA used a simplified procedure for special issuance of certifications to pilots whose uncorrected distant vision was worse than 20/100 but not worse than 20/200. FAA- certified Aviation Medical Examiners ["AME"] were given permission to evaluate applicants without further referral to eye specialists or to the FAA, and, in the absence of significant eye pathology, the AME could issue a certificate to a pilot whose vision was corrected to 20/20. *Id.* at 53,231-232.

29. *See Air Force Publications, AFI 48-123: Medical Examination and Standards*, <http://afpubs.hq.af.mil/elec-products/pubpages/48-pubs.stm> at p. 99; *Aeromedical Reference and Waiver Guide: Physical Exams and Standards*, <http://www.nomi.navy.mil/code04/toc97nf.htm> at p. 5. Copies of these documents have been lodged with the Clerk for the Court's convenience.

(including, at the time, the FAA), were routinely relying on just the sort of "uncorrected vision" standard used by United. In light of the federal government's continued reliance on these reasonable standards, there is simply no merit to Petitioners' insistence that standards of this sort are necessarily unlawful. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (presuming congressional awareness and approval of administrative regulations); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-20 (1975) ("We may assume that Congress was aware that the [National Labor Relations] Board, since its inception, has awarded backpay as a matter of course").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN J. GALLAGHER
Counsel of Record
KENNETH M. WILLNER
NEAL D. MOLLEN
MARGARET H. SPURLIN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004-2400
(202) 508-9500

ROBERT P. WARREN
DAVID A. BERG
AIR TRANSPORT ASSOCIATION
OF AMERICA, INC.
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004-1707
(202) 626-4000

Counsel for Amicus Curiae
Air Transport Association
of America, Inc.

Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

No. 97-1943

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,
Petitioners,

v.

UNITED AIR LINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF LPA, INC., IN SUPPORT OF RESPONDENT

DANIEL V. YAGER *
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae LPA, INC.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Should courts defer to the EEOC Interpretive Guidance that disabilities should be analyzed in their uncorrected state?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE TYPE AND LEVEL OF DEFERENCE THAT SHOULD BE ACCORDED AN AGENCY SHOULD DEPEND ON WHETHER THE AGENCY IS ENGAGED IN DECIDING QUESTIONS OF PUBLIC POLICY OR QUESTIONS OF LAW	4
A. The *Chevron* Doctrine Should Apply Only to Agency Public Policy Determinations	7
B. The *Chevron* Doctrine Should Not Apply to Agency Interpretive Rules, General Statements of Policy, or Rules of Agency Organization, Procedure, or Practice	11
II. THE *CHEVRON* DOCTRINE SHOULD NOT APPLY TO THE EEOC INTERPRETIVE GUIDANCE AT ISSUE IN THIS CASE	16
III. THE EEOC INTERPRETIVE RULE AT ISSUE IN THIS CASE DESERVES LITTLE DEFERENCE UNDER THE *SKIDMORE* DOCTRINE	19
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

	Page
Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990)	9
Atchison, Topeka & Sante Fe Railway, 44 F.3d 437 (7th Cir 1994), *aff'd on other grounds*, 516 U.S. 152 (1996)	6, 9, 17, 19
Bob Evans Farms v. NLRB, 163 F.3d 1012 (7th Cir. 1998)	7
Bowen v. Georgetown Hospital, 488 U.S. 204 (1988)	16-17
Bragdon v. Abbott, 118 S. Ct. 2196 (1998)	15
Central Midwest Interstate Low-Level Waste Commission v. Pena, 113 F.3d 1468 (7th Cir. 1997)	13
Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	*passim*
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	18
Electromation v. NLRB, 35 F.3d 1148 (7th Cir. 1994)	2
Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170 (3d Cir 1995), *cert. denied*, 516 U.S. 1093 (1996)	13
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	9, 16
Herman v. Nationsbank Trust Co., 126 F.3d 1354 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 54 (1998)	13
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	8
Jacks v. Crabtree, 114 F.3d 983 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1196 (1998)	13
Jaramillo v. INS, 1 F.3d 1149 (11th Cir. 1993)	10
Kienast v. Frank, 1990 WL 711359 (EEOC Mar. 27, 1990)	22
Marbury v. Madison, 5 U.S. 137 (1803)	7
Martin v. OSHRC, 499 U.S. 144 (1991)	15
Massachusetts v. FDIC, 102 F.3d 615 (1st Cir. 1996)	13
NLRB v. Town & Country Electric, Inc., 116 S. Ct. 450 (1995)	20
NLRB v. Winnebago Television Corp., 75 F.3d 1208 (7th Cir. 1996)	20

TABLE OF AUTHORITIES—Continued

	Page
Pierce v. Underwood, 487 U.S. 552 (1988)	7
Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993)	12
Reno v. Koray, 515 U.S. 50 (1995)	15
Shalala v. Guernsey Memorial Hospital, 514 U.S. 87 (1995)	15
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	5, 15, 19
Southern Ute Indian Tribe v. AMOCO Product Co., 119 F.3d 816 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999)	6, 12, 13, 14
Washington v. HCA Health Services, 152 F.3d 464 (5th Cir. 1998), *petition for cert. filed*, No. 98-1365, 67 U.S.L.W. 3561 (Dec. 2, 1998)	13, 20
Webcor Packaging, Inc. v. NLRB, cert. denied, 118 S. Ct. 1035 (1998)	2

DOCKETED CASES

Chelsea Indus., Inc., No. 7-CA-36846 (NLRB)	2

STATUTES

Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*	
5 U.S.C. § 553(b)(3)(A)	11
5 U.S.C. § 553(b)(3)(B)	12
5 U.S.C. § 706	7
The Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*	
42 U.S.C. § 12102	16
42 U.S.C. §§ 12111-12116	16
42 U.S.C. § 12116	16
Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*	21
U.S. Const. Art. III, § 1	11

REGULATIONS AND ADMINISTRATIVE MATERIALS

29 C.F.R. App. § 1630.2(j)	22

TABLE OF AUTHORITIES—Continued

	Page
29 C.F.R. App. § 1630.2(*l*)	22
56 Fed. Reg. 8578-8603 (1991)	17, 18, 19, 21
56 Fed. Reg. 35726-35756 (1991)	17, 18, 19, 20
MISCELLANEOUS	
Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Adm. L. Rev. 363 (1986)	6, 16, 20
Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise (1998 Supp.)	12, 15
EEOC Compliance Manual (1992)	22
EEOC, A Technical Manual Assistance Manual on Title I of the ADA (1992)	22
The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961)	11
The Federalist No. 79 (Alexander Hamilton) (Clinton Rossiter ed., 1961)	11
Daniel V. Yager & Joseph J. LoBue, *Is the Chevron Deference Standard Too High-Octane for the N.L.R.B.?*, 23 Empl. Rel. L.J. 67 (Spring 1998)	16
Webster's New World Dictionary (2d ed.)	4

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF LPA, INC., IN SUPPORT OF RESPONDENT

LPA respectfully submits this brief *amicus curiae* with the consent of all parties.[1] The brief contends that the EEOC interpretive rule at issue in this case should not be accorded deference under the *Chevron* doctrine and therefore supports the position of Respondent with respect to that question. The brief does not address any other questions for which certiorari was granted.

[1] Counsel for *amicus curiae* LPA authored this brief in its entirety. No person or entity other than the LPA made a monetary contribution to the preparation of the brief.

INTEREST OF THE *AMICUS CURIAE*

LPA, formerly the Labor Policy Association, is an organization of the senior human resources officers of over 250 of the nation's largest private sector employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development of laws and policies relating to employment. LPA's mission is to ensure that laws and policies affecting labor relations in the private sector are sound, practical, and responsive to the realities of the modern workplace.

Because of its interest in the development of the nation's labor laws, LPA has participated as *amicus curiae* on many labor law issues in cases before this Court, the United States Courts of Appeals, and various federal agencies.[2]

All of LPA's members are employers subject to the jurisdiction of numerous federal agencies such as the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), the U.S. Department of Labor Wage and Hour Division, and the Equal Employment Opportunity Commission. Many, if not all, of these agencies routinely issue "interpretive rules" designed to guide enforcement personnel in the execution of their duties. Often, as is the case here, these interpretive rules are presented to the courts to aid in the interpretation of federal statutory terms. LPA, therefore, is greatly concerned about one of the questions presented in this

[2] *E.g. Webcor Packaging, Inc. v. NLRB, cert. denied,* 118 S. Ct. 1035 (1998); *Electromation v. NLRB,* 35 F.3d 1148 (7th Cir. 1994); *Chelsea Indus., Inc.,* No. 7-CA-36846 (NLRB) (decision pending).

case—the level of deference that should be accorded agency interpretive rules.

STATEMENT OF THE CASE

The facts of the case are set out in Respondent's Brief.

SUMMARY OF ARGUMENT

This brief addresses only one issue for which certiorari was granted in this case—the extent to which the Court should defer to EEOC's Interpretive Guidance. Contrary to the contentions of Petitioners and their *amici*, the EEOC guidance should not be governed by the *Chevron* doctrine.

This Court has established two separate and distinct lines of cases on the question of deference to agency actions, the *Chevron* line and the *Skidmore* line. These two doctrines are significantly different in both nature and form. The *Chevron* doctrine is based on authority—that the issue in question is, in the first instance, for the agency to decide. The *Skidmore* doctrine, on the other hand, is based on persuasion—that the issue is for the courts to decide but deference nonetheless may be appropriate based on other factors that lend merit to the agency's position.

Because of this distinction, the *Chevron* doctrine applies only to agency public policy determinations—*i.e.* those instances where the agency acts to make the policy choices that have not been addressed by Congress. This view of *Chevron* is virtually compelled by the Administrative Procedure Act (APA), which directs that the courts decide all questions of law, and is firmly supported by both the text and reasoning of the *Chevron* decision itself. The *Skidmore* doctrine applies to agency interpretations of law:

where the issue remains with the court to decide; but where the court properly may be persuaded to defer where relevant extrinsic factors lend weight to the agency's view.

When an agency acts through "interpretive" rules, it acts neither in its public policy making capacity, nor through the important public policy making procedures of the APA. As such, interpretive rules can only be construed as involving questions of law, subject not to *Chevron*, but to the *Skidmore* line of cases. The EEOC Interpretive Guidance at issue in this case, as distinguished from the agency's substantive regulations, clearly is an exercise of the agency's law-interpreting, rather than public policy making function. As a result, the guidance is subject to review under *Skidmore* rather than *Chevron*.

Finally, applying the relevant *Skidmore* factors to the particular EEOC interpretation at issue in the case, it becomes clear that the rule is entitled to only minimal deference from the Court.

ARGUMENT

I. THE TYPE AND LEVEL OF DEFERENCE THAT SHOULD BE ACCORDED AN AGENCY DETERMINATION SHOULD DEPEND ON WHETHER THE AGENCY IS ENGAGED IN DECIDING QUESTIONS OF PUBLIC POLICY OR QUESTIONS OF LAW

Webster's dictionary defines the term "deference" as "a yielding in opinion, judgment, wishes." Webster's New World Dictionary 370 (2d ed.). When a court accords an agency determination "deference," it yields to the agency's judgment on a question that it might otherwise have decided differently. This Court, however, has established two separate and distinct lines of cases on the deference issue—the *Chevron* line and the *Skidmore* line.

In *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court adopted, in the legislative rulemaking context, a two part test for judicial review of agency regulations:

> First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), however, in the context of an agency interpretive rule, the Court announced a fundamentally different type of deference:

> We consider the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning,

> its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

As one can see, the *Chevron* and *Skidmore* doctrines are significantly different in nature and form: *Chevron* is based on authority—*i.e.* the question is for the agency to decide within a realm of answers permissible under the statute; whereas *Skidmore* is based on persuasion—*i.e.* the question is for the courts to decide, however, deference may nonetheless be appropriate based on *relevant extrinsic* factors that go to the merit of the agency's position. *See Atchison, Topeka, and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 445-46 (7th Cir. 1994) (Easterbrook, J., Posner, C.J., and Manion, J., concurring).

This authority/persuasion distinction is crucial as it provides the foundation for a consistent application of the two doctrines: authority deference applies when the agency has made public policy determinations; while persuasion deference applies where the agency has decided questions of law. Ignoring the distinction, on the other hand, "breeds confusion." *Id. See also Southern Ute Indian Tribe v. AMOCO Prod. Co.*, 119 F.3d 816, 833 n.24 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999). Moreover, as Justice Breyer has observed, treating deference as a unitary concept can lead courts to give more weight to an agency's legal arguments than to its public policy decisions, thereby reversing the proper roles of the political and judicial branches. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 364-65 (1986).

A. The *Chevron* Doctrine Should Apply Only to Agency Public Policy Determinations

That the *Chevron* doctrine applies only to agency public policy determinations, rather than agency determinations of law, is supported on many levels.

First, it is a well-settled and fundamental principle that Article III courts decide all questions of law. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). Furthermore, Section 706 of the Administrative Procedures Act (APA) makes it clear that, in the administrative law context, the "reviewing court," not the various agencies, "shall decide all relevant questions of law." 5 U.S.C. § 706. Indeed, it is questionable whether Congress could have delegated such a function to the executive, as it does not possess such a power itself. "It is the function of the courts and not the legislature . . . to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988).

The *Chevron* doctrine does not alter this fundamental principal. On the contrary, by its very terms, the *Chevron* doctrine is based on the proposition that there *is no law to apply*. In certain instances, Congress intentionally or inadvertently has not created law in a particular area—that is to say, Congress has not made the relevant public policy choice. In *some* of those instances, Congress has authorized administrative agencies to do so by granting the agency rulemaking power. It is this public policy making function of the agencies that is governed by *Chevron*. *See, e.g., Bob Evans Farms v. NLRB*, 163 F.3d 1012, 1019 (7th Cir. 1998) (refusing to apply *Chevron* to

an NLRB legal determination that did not "involve policy choices or rulemaking in the legislative sense").

This view of *Chevron* is supported on many levels. First, it is virtually compelled by the language of the APA, which in no uncertain terms assigns resolution of questions of law to the judiciary. Moreover, this view of the *Chevron* doctrine is supported by the text of the *Chevron* decision itself. The *Chevron* Court concluded that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress *had an intention* on the precise question at issue, *that intention is the law* and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987).

In those circumstances, it is the duty of the judiciary to ensure the law is found and applied. It is not enough that the agency has supplied a "permissible" rule of law. However, if Congress had *no intention*, there exists *no law* to find and apply. Under those circumstances, agencies with rulemaking power can make the public policy choices not addressed by Congress, provided that those choices are otherwise "permissible" (*i.e.*, not arbitrary, capricious, or contrary to the statute).

Throughout the *Chevron* decision, the Court consistently conditioned the appropriateness of *Chevron* deference on the absence of existing law.

> If, however, the court determines Congress has *not directly addressed* the precise question at issue . . .
>
> If Congress has explicitly *left a gap* for the agency to fill . . .

> [T]he Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress *did not actually have an intent* . . .
>
> [I]t is entirely appropriate for [the agency] to make such policy choices—resolving the competing interests which *Congress itself either inadvertently did not resolve, or intentionally left to be resolved* by the agency . . .

Chevron, 467 U.S. at 843, 844, 845, 865-66 (emphasis added). Thus, by its own terms, the *Chevron* doctrine applies to questions of public policy, not law.

That *Chevron* applies only to agency public policy determinations likewise is supported by the important requirement that an agency possess rulemaking power before invoking *Chevron*. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990). The *Chevron* doctrine applies only where the agency has rulemaking power. *Chevron*, 467 U.S. at 843-44; *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Atchison, Topeka & Sante Fe Ry.*, 44 F.3d 437, 441-42 (7th Cir. 1994) (en banc), *aff'd on other grounds*, 516 U.S. 152 (1996). Absent such public policy making power, an agency's views are entitled to only *Skidmore* (*i.e.* persuasiveness) deference. *General Elec. Co.*, 429 U.S. at 141-42. Conditioning the availability of *Chevron* deference on the presence of agency public policy making authority further supports the position that that doctrine applies only to agency public policy choices.

Finally, this view of *Chevron* is supported by the Court's important discussion of the distinction between the apolitical judicial department and the policially-accountable executive branch. Quite clearly, the Court reasoned in *Chevron* that deference to the agency was appropriate in that case because the executive, as a political branch of government, was accountable to the people. As the Court explained:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect the legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 866. In short, in *Chevron*, the "Court admonished courts not to forget to whom the authority and responsibility for . . . policy-making is entrusted." *Jaramillo v. INS*, 1 F.3d 1149 (11th Cir. 1993).

This reasoning is viable, but only if the issue in question concerns public policy choices, a task which the federal system has always entrusted to the politically accountable branches of government. An equally strong facet of the Constitutional scheme, however, is that it purposefully removes from the reach of the political branches the application of existing law, and places that duty in the hands of an *independent* judicial branch.[3] Indeed, the framers of the Constitution apparently were so fearful of placing the application of existing law in the hands of a politically accountable body that they went to great lengths to ensure that the judiciary was independent of political influence.[4] Thus, here again, the Court's reasoning in *Chevron* can support only the conclusion that the *Chevron* doctrine is limited to the agency's *public policy* making function.

B. The *Chevron* Doctrine Should Not Apply to Agency Interpretive Rules, General Statements of Policy, or Rules of Agency Organization, Procedure, or Practice

The *Chevron* doctrine should not apply to agency interpretive rules, general statments of policy, or rules of agency organization, procedure, or practice (collectively "interpretive rules"). This is because these forms of agency action—specifically exempted from the notice and comment requirements of the APA, 5 U.S.C. § 553(b)(3)(A)—do not constitute agency *public policy* determinations.

The distinction between agency public policy determinations (*i.e.* "legislative" rules) and "interpre-

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[3] *See* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (independence of the judiciary is an "excellent barrier to the enchroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.").

[4] *See* U.S. Const. Art. III, § 1 (providing life tenure with no diminution of pay for federal judges). *See also* The Federalist No. 73, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (necessity for life tenure); *Id.*, No. 79, at 472 (necessity for fixed pay).

tive" rules is a distinction of substance, not form. Legislative rules are definitive public policy choices intended by the agency to bind the agency, the courts and the public at large. Such rules generally have to be *adopted through* the political process—*i.e.* the notice and comment procedure—and are at all times *subject* to that political process in that they cannot be altered merely at the discretion of the agency. *Southern Ute Indian Tribe v. AMOCO Prod. Co.*, 119 F.3d 816, 833 n.23 (10th Cir. 1997), *citing* Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise § 6.2, at 228 (3d ed. 1994).[5] In this way, legislative rules not only are binding on the public but also *enforceable against the agency. Id.* Moreover, because of their authoritative nature, such rules generally can be challenged in the courts before they are applied to a particular case. *Id.*[6]

Interpretive rules, on the other hand, are not subject to the public policy making constraints of the APA. These rules, therefore, cannot constitute agency public policy decisions, but rather, merely reflect the agency's interpretations regarding questions of law.

[5] There are some rare and limited exceptions to this requirement, however, such as where notice and comment would be impracticable or contrary to the public interest. 5 U.S.C. § 553(b)(3)(B).

[6] *See, e.g., Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 (1993) ("The promulgation of the challenged regulations present plaintiffs with the immediate dilemma to choose between complying with the *newly imposed*, disadvantageous restrictions and risking serious penalties for violation.") (emphasis added). The operative concept here is that agency public policy determinations *create* "newly imposed" restrictions. Agency interpretations of law simply explain the restrictions that already exist within the statute.

These rules are not subject to pre-enforcement challenge, and may be altered at the discretion of the agency.

For these reasons, the majority of courts of appeals to directly confront this issue hold that agency interpretive rules are not entitled to the *Chevron* deference. *Cent. Midwest Interstate Low-Level Waste Comm'n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997) ("we do not apply *Chevron's* "rubber stamp" to interpretive rules"); *Jacks v. Crabtree*, 114 F.3d 983, 985 n.1 (9th Cir. 1997) (*Chevron* applies to legislative rules, not policy guidance), *cert. denied*, 118 S. Ct. 1196 (1998); *Southern Ute Indian Tribe v. AMOCO Prod. Co.*, 119 F.3d 816, 833 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999); *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996) (policy pronouncements less formal than legislative rules "are not accorded full *Chevron* deference"); *Washington v. HCA Health Services*, 152 F.3d 464, 469 (5th Cir. 1998), *petition for cert. filed*, No. 98-1365, 67 U.S.L.W. 3561 (Dec. 2, 1998).[7]

As the Ninth Circuit explained, such rules "are entitled to less deference than published regulations because they are not promulgated *subject* to the rigors of the Administrative Procedure Act, including public notice and comment, and 'are merely internal guidelines [that] may be altered by the [agency] at will.'" *Jacks v. Crabtree*, 114 F.3d at 985 n.1 (em-

[7] *But see Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1363-64 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 54 (1998); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

phasis added, citations omitted). The Tenth Circuit explained the danger of according *Chevron* deference to agency interpretive rules as follows:

> [A] practice of routine acceptance for interpretations expressed in [informal] formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats. And since these formats are exempt from APA public participation requirements, *an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when applied to them.*

Southern Ute Indian Tribe, 119 F.3d at 833 (emphasis in original), *quoting* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 4 (1990). Indeed, applying the *Chevron* doctrine to interpretive rules not subject to the APA rulemaking strictures would render those requirements nugatory, as agencies could issue, rescind, or reverse *binding* mandates on nothing more than the political whims of the administrators.

For organizations such as LPA and its members, such a rule of judicial deference would be highly troubling. LPA member companies are highly regulated by numerous federal agencies. The APA rulemaking procedure provides such companies the only available avenue to help shape public policy choices that will greatly affect their operations. The absence of strict adherence to that requirement by the agencies and courts undoubtedly will lead to regulation by

ambush. Based on these considerations, "the better-reasoned opinions" hold that interpretive rules are not entitled to *Chevron* deference. Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise § 3.5 at 55 (1998 Supp.).

This Court, while not expressly holding *Chevron* inapplicable to agency interpretive rules, has nonetheless generally taken that approach. *See, e.g., Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules . . . do not have the force and effect of law, and are not accorded that weight in the adjudicatory process"); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (interpretive rules should be shown "some" deference); *Martin v. OSHRC*, 499 U.S. 144, 157 (1991) ("Although not entitled to the same deference as norms that derive from the exercise of the Secretary's lawmaking powers, [interpretive rules] are still entitled to some weight on judicial review."); *Skidmore*, 323 U.S. at 140. Although, on certain occasions, the Court has cited *Chevron* in such cases in *dictum*. *See Koray*, 515 U.S. at 61; *Bragdon v. Abbott*, 118 S. Ct. 2196, 2209 (1998).[8]

The Court should use this opportunity to definitively rule that the *Chevron* doctrine applies only to

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[8] In both of these cases, the Court decided that the agency's interpretation was the "best" interpretation of the statute, therefore its citation to *Chevron* was clearly dictum. Moreover, in *Koray*, *Chevron* apparently was cited only for *Chevron* step one—that the agency interpretation may be considered where it is "permissible" (*i.e.* where the statute is ambiguous). *Koray*, 515 U.S. at 61. With regard to the type of deference due, however, the Court cited only *Skidmore*-line cases. *Id.*

agency public policy determinations, not interpretive rules.[9]

II. THE *CHEVRON* DOCTRINE SHOULD NOT APPLY TO THE EEOC INTERPRETIVE GUIDANCE AT ISSUE IN THIS CASE

In issuing the interpretive guidance in question in this case, EEOC unquestionably intended merely to interpret existing law, not to exercise its public policy making power. Accordingly, the agency's guidance is not entitled to *Chevron* deference.

As a preliminary matter, we note that this necessarily must be so, because EEOC lacks the power to make public policy choices in this area. Congress granted EEOC rulemaking power only with respect to "Title I" of the ADA. 42 U.S.C. § 12116 (giving EEOC regulatory authority over 42 U.S.C. §§ 12111-12116). The statutory term that the interpretative rule here purports to define, however—the definition of "disability"—is not contained within Title I of the Act. *See* 42 U.S.C. § 12102. Thus, strictly speaking, EEOC could not exercise a public policy making function on this particular issue, and its guidance necessarily must be considered interpretive. *See General Electric Co. v. Gilbert*, 429 U.S. at 141; *Bowen v.*

[9] The law/public policy distinction in the deference context is an important issue that should be addressed by the Court. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Adm. L. Rev. 363 (1986). Moreover, the issue has significance for the public in general, and employers in particular, well beyond the narrow impact of the EEOC interpretive rule at issue here. For a detailed look at the law/public policy distinction in the context of NLRB adjudications, *see* Daniel V. Yager & Joseph LoBue, *Is the Chevron Deference Standard Too High-Octane for the NLRB?*, 23 Empl. L.J. 67 (Spring 1998).

Georgetown Hosp., 488 U.S. 204, 208 (1988); *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d at 440.

Nevertheless, even if EEOC was competent to exercise such power on this issue, the agency did not do so here. This is clearly evident from both the label attached to the rules by the agency—*i.e.* "interpretive guidance"—as well as from the circumstances of their issuance. For example, EEOC issued its "interpretive guidance" at precisely the same time it issued its "substantive regulations." *See* 56 Fed. Reg. 8578-8603 (1991); 56 Fed. Reg. 35726-35756 (1991). Yet EEOC consistently treated the two sets of rules as separate and distinct. *See* 56 Fed. Reg. 8578 (1991) (EEOC's notice of proposed rulemaking indicated that the Commission was "*also* issuing interpretive guidance") (emphasis added); 56 Fed. Reg. 35726 (1991) ("The Commission is *also issuing interpretive guidance concurrently with* the issuance of part 1630.") (emphasis added).

Moreover, EEOC consistently made the purpose of the guidance clear:

> The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 in order to ensure that qualified individuals with disabilities understand their rights . . . . [The guidance] represents the Commission's *interpretation* of the issues discussed, and the Commission will be *guided* by it when resolving charges of employment discrimination.

56 Fed. Reg. 35726 (1991) (emphasis added); 56 Fed. Reg. 8578 (1991). Thus, the EEOC rules are paradigmatic "interpretive rules," which are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it ad-

ministers." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

Most importantly, however, the EEOC guidance exhibits none of the indicia of legislative rulemaking. The agency expressed no intent to bind the public or the agency by this guidance. On the contrary, EEOC expressly stated that it would merely be "guided" by the rules in "resolving charges of discrimination." 56 Fed. Reg. 35726 (1991). Indeed, EEOC made clear that it had no intent to be bound by the interpretations, explicitly stating that it intended to issue "more detailed" guidance—not published for notice and comment—in the future. See 56 Fed. Reg. 35726 (1991).[10] Such intentions do not make this guidance subject to pre-enforcement challenge, nor do they preclude the agency from altering its position at will. As a result, the EEOC interpretive guidance cannot be construed as legislative in any sense, and should not be accorded deference under *Chevron*.[11]

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[10] This guidance—issued in the form of EEOC compliance and technical assistance manuals—apparently was never actually published for comment, and comment on this "forthcoming" guidance was invited only with respect to three issues—insurance, workers' compensation, and collective bargaining. *See* 56 Fed. Reg. 8578-79 (1991).

[11] Petitioners and the United States as *amicus curiae* argue that the interpretive guidance should be governed by *Chevron* because it was "subject to the same notice and comment as the regulations." This contention is both irrelevant and incorrect. It is irrelevant because notice and comment is simply a prerequisite to legislative rulemaking, as explained above, it is not determinative on the question. The contention is also incorrect because the agency did not invite comment on the interpretive guidance in general but merely on one section of the guidance, the definition of "regarded as." 56 Fed. Reg. 8578 (1991). Indeed, the particular interpretive rule at issue

III. THE EEOC INTERPRETIVE RULE AT ISSUE IN THIS CASE DESERVES LITTLE DEFERENCE UNDER THE *SKIDMORE* DOCTRINE

Because, as demonstrated above, EEOC's interpretive guidance is simply an attempt to interpret statutory terms rather than an exercise of the agency's policy making function, the questions addressed in that guidance are questions of law for the courts to decide. Thus, any deference given to those interpretations must be *Skidmore*-type deference.

As noted above, *Skidmore* deference is based on the presence (or absence) of merit factors that are extrinsic to the agency's legal interpretation, but nonethe less are relevant to the proper interpretion of the law. The essence of the *Skidmore* doctrine is that the court must be persuaded to yield to the agency's view. *Skidmore*, 323 U.S. at 140.

Among the factors relevant to this inquiry are:

1) the thoroughness in wh ch the agency considered the matter;

2) The validity of the reasoning cited by the agency as justification for the rule; and

3) The consistency of the rule with regard to earlier and later pronouncements of the agency.

Skidmore, 323 U.S. at 140. Other relevant factors identified by the courts have included: contemporaneity with the statute;[12] the circumstances of the

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in this case was not even published for comment at all. *Compare* 56 Fed. Reg. 8593 (1991) *with* 56 Fed. Reg. 35741 (1991).

[12] *Atchison, Topeka & Santa Fe Ry. Co.*, 44 F.3d at 445 (Easterbrook, C.J., concurring) ("a legal interpretation

rule's promulgation;[13] technical expertise or experience possessed by the agency that is relevant to the issue in question;[14] and the extent to which the agency can be trusted.[15]

Under these standards, the EEOC guidance does not fare well. First and foremost, the thoroughness and validity of the agency's reasoning fails egregiously. As the agency's Section-by-Section Analysis of Comments and Revisions makes clear, the only justification offered by the agency for adopting the rule at issue in this case was as follows:

> The[] revision[] responds to comments from disability rights groups that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or corrective measures.

While the agency stated that its rule purportedly was consistent with some of the legislative reports, EEOC nonetheless gave no reason for adopting the rule other than pressure from interests groups. 56 Fed. Reg. 35728.

While such a rationale is permissible, and perhaps expected, in the public policy context, pressure from

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adopted soon after the statute's enactment may be the best evidence of the meaning the words carried in the legal profession at the time").

[13] *Washington*, 152 F.3d at 470.

[14] *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995) (citing the NLRB's special "understanding of labor relations"); Breyer, *supra* at 370-71.

[15] *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208 (7th Cir. 1996) ("The fact is that 'an administrative agency, like any other first-line tribunal, earns—or forfeits—deferential judicial review by its performance.'"); *Breyer, supra* at 371.

interest groups simply has no relevance in the proper interpretation of existing law. That is to say, a court should not be *persuaded* of the propriety of a legal interpretation simply because it was adopted to satisfy interest groups. On the contrary, such reasoning can lead one only to conclude that the agency reached its conclusion for the wrong reason. Because EEOC gives no other reason for its rule, both the thoroughness and validity factors clearly weigh against according deference.

The consistency of interpretation factor also weighs against deference in this case. United States as *amicus curiae* contends that EEOC has maintained a consistent position on the question at issue here—that "substantially limits" is evaluated without respect to corrective measures. This contention is simply untrue. Indeed, the agency's very first interpretation of the statutory provisions at issue here did not purport to make such a rule. In fact, the original EEOC guidance implied just the opposite—that "substantially limited" must be determined "on a case-by-case basis." 56 Fed. Reg. 8602 (1991). *See also* 56 Fed. Reg. 8594 (1991) ("The determination of whether an individual has a disability is not based on the name or diagnosis of the impairment the person has, but rather the effect of that impairment on the life of the individual.")[16] Similarly, the agency's

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[16] EEOC's original guidance followed its interpretation of the same question under the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*, another "earlier pronouncement" that likewise is inconsistent with the agency's present interpretive rule

> In the present case, it is undisputed that appellant has a vision impairment which requires her to wear corrective lenses. Appellant does not claim that her vision problems were not fully corrected by wearing the lenses. *Conse-*

present interpretive guidance is not even internally consistent on this point, indicating in several places that mitigating measures should be considered. *See, e.g.*, 29 C.F.R. App. § 1630.2(*l*) (an "individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment. For example: an employee has *controlled* high blood pressure which *does not substantially limit his work activities* . . . .); 29 C.F.R. App. § 1630.2(j) (The determination of substantially limited is based "on the effect of th[e] impairment on the life of the individual.")

Finally, the EEOC interpretive rule at issue in this case is inconsistent with the agency's later pronouncements. *See, e.g.*, EEOC, A Technical Manual Assistance Manual on Title I of the ADA, § 2.2(c)(1) (1992) (restating the controlled high blood pressure example); EEOC Compliance Manual § 902.4 (The substantially limited "analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting for that individual.") Thus, the consistency factor also weighs against a finding of deference in this case.[17]

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quently, we find that appellant was *not substantially limited* in an of her major life activities . . .

Kienast v. Frank, 1990 WL 711359, at *6 (EEOC Mar. 27, 1990) (emphasis added).

[17] With regard to the other relevant factors noted above, only one—the circumstances of the rule's promulgation—requires significant comment. The interpretive rules at issue in this case are published in the Code of Federal Regulations. As such, the rules deserve more serious consideration by the courts than less formal interpretations issued by the agency, such as internal memoranda or *amicus curiae* briefs. Moreover, the interpretive guidance in general was published for at least some comment. That the agency asked for, and received, input from interested parties also should be looked upon favorably by the courts. The importance of this factor *in this particular case*, however, is greatly reduced because EEOC did not publish the particular rule at issue here for comment. While on balance the "circumstances of promulgation" factor weighs slightly in favor of deference, it does little to tip the scales in light of the other *Skidmore* factors. The three remaining factors, contemporaneity, expertise and trust, all have little relevance to the question presented here. The ADA, passed in 1990, is a very recent act. The Court, therefore, has a full appreciation of the meaning of the words chosen in the statute. Likewise, the issue presented is a question of pure statutory construction that requires little, if any, technical or specialized knowledge. Thus, the Court is equally if not better suited to resolve this question than EEOC. Finally, there is no indication that EEOC has acted inappropriately, therefore, the trust factor also is inapplicable.

In light of all the relevant *Skidmore* persuasion factors, it is clear that the EEOC interpretive rule at issue in this case deserves minimal deference from the Court.

CONCLUSION

For the foregoing reasons, LPA respectfully submits that the *Chevron* doctrine should not apply to the EEOC Interpretive Guidance and the Court should accord the guidance only minimal deference under *Skidmore*.

Respectfully submitted,

DANIEL V. YAGER *
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae LPA, INC.

* Counsel of Record

FILED
MAR 24 1999
OFFICE OF THE CLERK

Nos. 97-1943 and 97-1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,
Petitioners,
v.
UNITED AIR LINES, INC.,
Respondent.

VAUGHN L. MURPHY,
Petitioner,
v.
UNITED PARCEL SERVICE, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Attorneys for *Amicus Curiae* The Chamber of Commerce of the United States of America

J. WALKER HENRY
CLARK HILL P.L.C.
500 Woodward Avenue, Suite #3500
Detroit, MI 48226
(313) 965-8300
Attorneys for *Amicus Curiae* Michigan Manufacturers Association

ANN ELIZABETH REESMAN
CORRIE L. FISCHEL *
McGUINESS & WILLIAMS
1015 Fifteenth St., N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae* Equal Employment Advisory Council
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASES 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT WHETHER AN INDIVIDUAL HAS A DISABILITY SHOULD BE ASSESSED BASED ON THE INDIVIDUAL'S USE OF CORRECTIVE MEASURES 8

A. The ADA Requires That an Individual Actually Be Substantially Limited in a Major Life Activity To Establish a Disability Under the ADA 8

B. The Court Should Not Defer to EEOC's Interpretive Guidance 14

1. EEOC's Interpretative Guidance Is Not Entitled to Deference Because It Is Manifestly Contrary to the Statute 14

2. The *Chevron* Doctrine Does Not Apply to Interpretative Rules 15

C. At a Minimum, This Court Should Hold That the ADA Does Not Cover Individuals With Controlled, Minor Impairments That Are Widely Shared 18

D. A Ruling That the Use of Corrective Measures Should Be Considered in Determining Whether an Individual Is Substantially Limited Will Not Discourage the Use of Corrective Measures 20

TABLE OF CONTENTS—Continued

	Page
II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYERS DID NOT "REGARD" THE PETITIONERS AS DISABLED	23
A. The ADA Requires That a Plaintiff Establish That an Employer Regarded the Individual as Substantially Limited in a Major Life Activity To Establish That the Individual Is "Regarded As" Disabled	23
1. The Perception That an Individual Is Unable To Perform a Particular Job Does Not Translate Into a Perception That the Individual Is Substantially Limited	23
2. An Employment Rejection Based on a Medical Condition Is Not Enough To Establish an Issue of Fact That an Employer Regarded an Individual as Disabled	26
B. A Ruling That a "Regarded As" Claim Can Be Established Based on Medical or Physical Criteria Used in Rejecting an Individual From an Employment Opportunity Will Restrict Significantly an Employer's Ability to Establish Job Qualifications	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Alexander v. Choate, 469 U.S. 287 (1985)	3
Arnold v. UPS, 136 F.3d 854 (1st Cir. 1998)	7, 9, 19, 20
Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998)	9
Bartlett v. New York State Board of Law Examiners, 156 F.3d 321 (2d Cir. 1998), *petition for cert. filed*, No. 98-1285, 67 U.S.L.W. 3528 (Feb. 23, 1999)	9
Baulos v. Roadway Exp. Inc., 139 F.3d 1147 (7th Cir. 1998)	24
Bragdon v. Abbott, 118 S.Ct. 2196 (1998)	3
Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997)	27
Burlington Industries v. Ellerth, 524 U.S. 742 (1998)	3
Burroughs v. City of Springfield, 163 F.3d 505 (8th Cir. 1998)	22
CONRAIL v. Darrone, 465 U.S. 624 (1984)	3
Central Midwest Interstate Low-Level Waste Commission v. Pena, 113 F.3d 1468 (7th Cir. 1997)	15
Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1101 (1994)	27
Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	14, 17
Chrysler Corp. v. Smolarek, cert. denied, 493 U.S. 992 (1989)	3
Connecticut National Bank v. Germain, 503 U.S. 249 (1992)	10, 11
Daley v. Koch, 892 F.2d 212 (2d Cir. 1989)	19
Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998)	9
Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170 (3d Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996)	15
General Motors Corp. v. Romein, 503 U.S. 181 (1992)	4
Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997)	6, 9, 10
Harris v. H&W Contr. Co., 102 F.3d 516 (11th Cir. 1996)	9

TABLE OF AUTHORITIES—Continued

	Page
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	3
Herman v. Nationsbank Trust Co., 126 F.3d 1354 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 54 (1998)	15
Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), *cert. denied*, 502 U.S. 1162 (1997)	9
I.N.S. v. Cardoza Fonseca, 480 U.S. 421 (1987)	14
International Union, UAW v. Johnson Controls, 499 U.S. 187 (1991)	3
Jacks v. Crabtree, 114 F.3d 983 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1196 (1998)	15, 16
Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1995)	24
Kirkinburg v. Albertsons, Inc., 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999)	9
Massachusetts v. FDIC, 102 F.3d 615 (1st Cir. 1996)	15
Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997)	9
McKay v. Toyota Motor Manufacturing, 110 F.3d 369 (6th Cir. 1997)	26
McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995)	4
Miller v. City of Springfield, 146 F.3d 612 (8th Cir. 1998)	24
Murphy v. UPS, 1998 U.S. App. LEXIS 4439 (10th Cir. 1998)	6
Murphy v. UPS, 946 F. Supp. 872 (D. Kan. 1996)	5
Pryor v. Trane Co., 138 F.3d 1024 (5th Cir. 1998)	24
Reno v. Koray, 515 U.S. 50 (1995)	17
Roth v. Lutheran General Hospital, 57 F.3d 1446 (7th Cir. 1995)	9
School Board of Nassau County v. Arline, 480 U.S. 273 (1987)	3, 23
Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995)	7, 20-21, 22

TABLE OF AUTHORITIES—Continued

	Page
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	17
Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996)	7, 26, 27
Solileau v. Guilford of Maine, 105 F.3d 12 (1st Cir. 1997)	6, 18
Southern Ute Indian Tribe v. AMOCO Production Co., 119 F.3d 816 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds*, 151 F.3d 1251 (1998), *cert. granted*, 119 S. Ct. 899 (1999)	15, 16
Sutton v. United Air Lines, 130 F.3d 893 (10th Cir. 1998)	4, 5, 8
Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir. 1997)	23, 27, 28
U.S. v. Ramirez-Ferrer, 82 F.3d 1131 (1st Cir. 1996)	10
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)	12
University of Texas v. Camenisch, 451 U.S. 390 (1981)	3
Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3561 (Dec. 2, 1998)	6, 7, 9, 15, 19
Witter v. Delta Air Lines, 138 F.3d 1366 (11th Cir. 1998)	25
Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995)	24, 28
Zirpel v. Toshiba America Information System, 111 F.3d 80 (8th Cir. 1997)	9
FEDERAL STATUTES	
Administrative Procedure Act, 5 U.S.C. § 553	15
Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*	6, 8
42 U.S.C. § 12101(A)(7)	21
42 U.S.C. § 12102(2)	6, 7, 8, 23
42 U.S.C. §§ 12111-12117	2

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 12111(8)	22
42 U.S.C. § 12111(9)	11
42 U.S.C. § 12112(a)	8
42 U.S.C. § 12113(a)	28
42 U.S.C. §§ 12181-12189	2
42 U.S.C. § 12182(b)(2)(iii)	11
Rehabilitation Act of 1973,	
29 U.S.C. §§ 701 *et seq.*	3
29 U.S.C. § 793	2
29 U.S.C. § 794	2
LEGISLATIVE HISTORY	
H.R. Rep. No. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303	3, 11, 13, 23
H.R. Rep. No. 101-485, pt. 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445	11
S. Rep. No. 101-116 (1989)	3, 11, 12, 13
REGULATIONS AND ADMINISTRATIVE MATERIALS	
29 C.F.R. App. § 1630.2(1)	18, 24
56 Fed. Reg. 8593 (1991)	17
MISCELLANEOUS	
EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act* (1992)	25
Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise (1998 Supp.)	16
Erica W. Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search For the Meaning of Disability*, 73 Wash. L. Rev. 575 (1998)	13, 22
Adam C. Wit, *Should "Mitigating Measures" Be Considered in the "Disability" Analysis under the ADA?* 24 Empl. Rel. L.J. 73 (Summer 1998)	22

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council, The Chamber of Commerce of the United States of America, and the Michigan Manufacturers Association respectfully submit this brief as *amici curiae*.[1] Letters of consent from all parties have been filed with the Court. The brief urges this Court to affirm the decisions below, and thus supports the position of Respondents United Air Lines, Inc. and United Parcel Service, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than

[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment law issues of national concern to the business community.

The Michigan Manufacturers Association (MMA) is an association of private Michigan employers studying matters of general interest to its members; promoting their interests and the interests of all Michigan employers in the proper administration of laws; and otherwise promoting the general business and economic welfare of Michigan. MMA's over four thousand members employ 90% of the industrial workforce in Michigan—over one million employees. An important aspect of MMA's activities is representing its members' interests in matters before the courts as *amicus curiae*.

All of EEAC's members and many of the Chamber's and MMA's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117 (Title I). Many own commercial facilities subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189 (Title III), and many own, operate, lease, or lease to places of public accommodation, also subject to Title III. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also, some members are the recipients of federal financial assistance and therefore are subject to the nondiscrimination provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 share a common definition of "disability" which establishes the parameters of the pro-

tected class under each statute.[2] Both statutes define "disability" in terms of an impairment that "substantially limits" a major life activity. Thus, EEAC's, the Chamber's and MMA's members have a direct interest in the issues presented in this case; *i.e.*, whether a court should determine whether an individual has a disability based on the individual's use of corrective measures, and whether an individual can establish a "regarded as" claim under the ADA simply because the individual has an impairment or medical condition that renders the individual unqualified for a particular job.

Because of their interest in the application of the nation's fair employment laws, EEAC, the Chamber, and MMA have filed briefs as *amicus curiae* in numerous cases before this Court.[3] Thus, EEAC, the Chamber, and

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[2] The ADA definition of "disability" mirrors the definition of "handicapped individual" that appeared in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, at the time the ADA was passed, and the ADA's legislative history confirms the Rehabilitation Act as the source of the ADA definition. S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 332. *See also Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998) ("[T]he ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act.")

[3] EEAC participated as *amicus curiae* in *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), which addressed the definition of a "disability" under the ADA. EEAC also participated as *amicus curiae* in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and other cases in this Court construing the Rehabilitation Act of 1973. *E.g., Alexander v. Choate*, 469 U.S. 287 (1985); *CONRAIL v. Darrone*, 465 U.S. 624 (1984); *University of Texas v. Camenisch*, 451 U.S. 390 (1981). EEAC and the Chamber have participated in numerous other employment discrimination cases before this Court. *E.g., International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991) (sex discrimination); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (sexual harassment); *Hazen Paper Co. v. Biggins* 507 U.S. 604 (1993) (age discrimination). MMA has also filed briefs with this Court in *Chrysler Corp. v. Smolarek, cert. denied*, 493 U.S. 992 (1989) (whether § 301 of the Labor Management Relations Act preempted claims under Michigan's Handicappers' Civil

MMA have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC, the Chamber, and MMA seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties. Because of their experience in these matters, EEAC, the Chamber, and MMA are well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASES

Sutton v. United Air Lines, Inc.

Petitioners Karen Sutton and Kimberly Hinton are twin sisters who were commercial airline pilots for regional commuter airlines. Each had a "life long goal to fly for a major air carrier." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 895 (10th Cir. 1998). While each of the Petitioners has 20/20 corrected vision in both eyes, without correction their vision is 20/200 in the right eye and 20/400 in the left eye. *Id.* As a result, the sisters do not qualify for commercial airline pilot positions with United Air Lines ("United") because the company requires that applicants for pilot positions have at least 20/100 uncorrected vision in each eye. *Id.*

The sisters sued United under ADA, alleging that United had discriminated against them because they were substantially limited in the major life activity of seeing. Alternatively, the sisters alleged that United regarded them

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Rights Act) and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) (retroactive application of an amendment to the Workers' Disability Compensation Act in Michigan). EEAC, the Chamber, and the MMA all participated in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (after-acquired evidence) before this Court.

as disabled by regarding them as substantially limited in the major life activity of working. *Id.* The district court held that the sisters were not disabled under the ADA because their vision impairments, when corrected, did not substantially limit a major life activity. *Id.* at 896. The district court further found that United did not regard the sisters as disabled. *Id.* On appeal, the Tenth Circuit affirmed the district court's decision. *Id.* at 906. The Court granted the sisters' petition for a *writ of certiorari.*

Murphy v. United Parcel Service, Inc.

Petitioner Vaughn Murphy ("Murphy") has had high blood pressure since he was ten years old. *Murphy v. UPS*, 946 F.Supp. 872, 875 (D. Kan. 1996). In August of 1994, he applied for a position with United Parcel Service, Inc. ("UPS") as a mechanic. Since UPS mechanics are required to drive large trucks, they must hold commercial driver's licenses. *Id.* In order to hold a commercial driver's license, the Department of Transportation ("DOT") requires that an individual meet certain physical qualification standards, including a blood pressure level less than 160/90. *Id.* at 876. When Murphy took his DOT physical examination in August of 1994, his blood pressure was 186/124, well above the DOT limit. The testing clinic, however, erroneously issued him a "DOT health card." Approximately one month later, while reviewing medical records, UPS' Medical Services Supervisor discovered the error. UPS terminated Murphy after retesting his blood pressure, and confirming that it exceeded the DOT limit. *Id.*

Murphy sued UPS under the ADA, arguing in part that UPS had discriminated against him because he had a disability, or alternatively, because it regarded him as having a disability. The district court granted summary judgment in favor of UPS, and Murphy appealed. *Id.* at 884. The Tenth Circuit affirmed the district court's deci-

sion, finding that whether Murphy was substantially limited should be determined in his medicated state and that UPS did not regard Murphy as disabled because it relied on the DOT blood pressure standards. *Murphy v. UPS*, 1998 U.S. App. LEXIS 4439 (10th Cir. 1998) (unreported decision). This Court granted the petition for a *writ of certiorari*.

SUMMARY OF ARGUMENT

The Court of Appeals properly concluded that Petitioners are not individuals with disabilities protected by the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA). Whether an individual has a "disability" as defined by the plain language of the ADA turns on whether the individual has an impairment that in fact "substantially limits a major life activity." 42 U.S.C. § 12102(2). Therefore, any mitigating measures the individual uses to reduce the effect of the impairment necessarily affects this determination. *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997). The legislative history, although conflicting, ultimately supports this conclusion. Thus, the EEOC's guidance is entitled to no deference because it is manifestly contrary to the statute.

The ADA was not intended to cover those individuals who have common, minor impairments that are easily controlled. Rather, it requires that an individual be "substantially limited," a comparative term that "is to be measured in relation to normalcy, or in any event, to what the average person does." *Solileau v. Guilford of Maine*, 105 F.3d 12, 15-16 (1st Cir. 1997). An individual with a commonly controlled, widely-shared condition is simply not "substantially limited" as compared to the average person. Indeed, the First and Fifth Circuits both have suggested that even if the EEOC guidance is to be deferred to on the question of whether mitigating measures should be used, the guidance is not applicable unless serious impairments are at issue. *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3561 (Dec. 2, 1998) (No. 98-1365); *Arnold v. UPS*, 136 F.3d 854, 866 (1st Cir. 1998).

The notion that a contrary ruling will prevent individuals from utilizing such measures is meritless. Rational individuals will not forego necessary medical procedures simply to obtain the Act's protections. Further, an individual who does not utilize available corrective measures may in fact lose the Act's protections because they are not qualified. *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995).

The Court of Appeals also correctly concluded that the employers in these cases did not regard the petitioners as disabled. In order to estabilsh that an individual is regarded as disabled, the individual must establish that he or she is regarded as being substantially limited in a major life activity. 42 U.S.C. § 12102(2)(C). The simple perception that an individual is unable to perform a particular job does not translate into a perception that the individual is substantially limited in employment opportunities in general. Further, rejection based on a medical condition or a medical standard does not automatically establish a "regarded as" claim. *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996). A contrary ruling not only would prohibit employers from developing legitimate qualification standards, but will result in extensive litigation for the courts and employers. This is not the result Congress had in mind when passing the ADA.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT WHETHER AN INDIVIDUAL HAS A DISABILITY SHOULD BE ASSESSED BASED ON THE INDIVIDUAL'S USE OF CORRECTIVE MEASURES

A. The ADA Requires That An Individual Actually Be Substantially Limited In a Major Life Activity To Establish a Disability Under the ADA

The Court of Appeals correctly concluded that the plain language of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, requires that an assessment of whether an individual has a disability under part A of the ADA's definition of "disability" take into account the individual's use of corrective measures. *Sutton v. United Air Lines*, 130 F.3d 893, 902 (10th Cir. 1998). The ADA prohibits discrimination in employment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The verb "limits" is used in its present tense form. Therefore, an individual who is not presently "substantially limited" in a major life activity does not have a "disability" under part A of the statutory definition. Thus, if an individual currently is able to control the effects of his or her impairment with medication or other mitigating measures so that he or she is not substantially limited in a major life activity, he or she should not be considered disabled under part A of the definition.

Like the Tenth Circuit, the Sixth Circuit has held that the plain language of the ADA requires that a "disability" under part A be evaluated based on the individual's limitations with the use of medication. *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997) (Kennedy, J. and Guy, J. concurring on this point.).[4] Judge Kennedy, in her concurring opinion, pointed out that the term "sub-

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[4] Conversely, the Second, Third, and Eleventh Circuits have unequivocally ruled that mitigating measures should *not* be considered. *Barlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998), *petition for cert. filed*, No. 98-1285, 67 U.S.L.W. 3528 (Feb. 23, 1999); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938 (3d Cir. 1997); *Harris v. H&W Contr. Co.*, 102 F.3d 516, 520-521 (11th Cir. 1996). The Ninth Circuit has mentioned this same principle although it decided the case on other grounds. *E.g., Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 364 (9th Cir. 1996), *cert. denied*, 502 U.S. 1162 (1997); *Kirkingburg v. Albertsons, Inc.*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999). While one Seventh Circuit panel clearly held that mitigating measures should not be considered, *e.g. Baert v. Euclid Bev., Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998), another Seventh Circuit panel cited the EEOC's guidance on evaluating a disability without regard to mitigating measures, but then proceeded to analyze whether the plaintiff had a disability based on his use of eyewear. *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995). The Eighth Circuit similarly endorsed the notion that mitigating measures should not be considered in *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998), but took an approach similar to *Roth* in *Zirpel v. Toshiba Am. Info. Sys.*, 111 F.3d 80, 81 (8th Cir. 1997) (determining that individual was not disabled based in part on the fact that the panic disorder was very manageable with treatment, thereby endorsing argument that mitigating measures should be considered.) The First Circuit has held that mitigating measures should not be taken into account, but limited its decision to diabetes, and suggested that it could take a different approach if a different medical condition were at issue. *Arnold v. UPS*, 136 F.3d 854, 859-866 (1st Cir. 1998). The Fifth Circuit has taken a middle of the road approach, holding that only "serious impairments" should be considered without regard to mitigating measures, but reserving the determination of what is "serious" to be resolved on a case-by-case basis. *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470-471 (5th Cir. 1998).

stantially limited" would be written out of the statute if a person were not in fact evaluated given the effects of his or her medication. In rejecting the EEOC's opposite conclusion as to the meaning of the ADA, Judge Kennedy observed as follows:

> The EEOC is creating a different standard for persons who take medication for their condition. This conflicts with the *plain reading* of the statute. The ADA does not provide protection for anyone with any degree of physical or mental impairment: It provides protection only for those impairments that substantially limit their lives. I do not believe that Congress intended the ADA to protect as "disabled" all individuals whose life activities would *hypothetically* be substantially limited were they to stop taking medication.

Mecosta, 124 F.3d at 767 (Kennedy, J., concurring in part, dissenting in part) (emphasis added).

Thus, this Court should look no further than the statutory definition of the ADA to determine whether the use of medication or other corrective measures should be considered to determine whether an individual is substantially limited in a major life activity under part A of the ADA's "disability" definition. "The starting point in statutory interpretation is the language [of the statute] itself.'" *U.S. v. Ramirez-Ferrer*, 82 F.3d 1131, 1136 (1st Cir. 1996) (quoting *U.S. v. James*, 478 U.S. 597, 604 (1986)). For, as this Court has stated "time and again," the "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Unless a statute's wording is unclear, a court should not even pause to consider arguments for a different interpretation based on legislative history or purpose. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Id. (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Should the Court choose to look further than the plain language of the ADA, however, the Court will find that although conflicting, the legislative history ultimately supports the conclusion reached by the Court of Appeals below. The Reports of the House Education and Labor Committee, the House Judiciary Committee, and the Senate Committee on Labor and Human Resources ("Senate Labor Committee") all state that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as *reasonable accommodation or auxiliary aids*." H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. Rep. No. 101-116, at 23 (1989) (emphasis added). The two House Reports proceed to assert that mitigating measures include medication and assistive devices such as hearing aids. H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; H.R. Rep. No. 101-485, pt. 3, at 28-29, *reprinted in* 1990 U.S.C.C.A.N. at 451.

The Senate Report makes no such assertion, however. This suggests that at least one Congressional committee was referring to *employer* provided accommodations when stating that mitigating measures should not be considered. The ADA defines a "reasonable accommodation" in the context of the obligations an employer has with respect to an individual with a disability, and "auxiliary aids" in the context of the obligations a place of public accommodation has with respect to an individual with a disability. *See* 42 U.S.C. §§ 12111(9), 12182(b)(2)(iii). Further, in its discussion of the meaning of reasonable accommodation, the Senate report states emphatically that "[t]he Committee wishes to make it clear that non job-related personal use items such as hearing aids and eye-

glasses are not included in this provision." S. Rep. No. 101-116 at 33.

Further, the Senate Report unequivocally states that part of the rationale for including the "regarded as" prong in the overall definition of a "disability" was to cover individuals who, because of their ability to *control* an impairment, were *not in fact* substantially limited but nevertheless were *falsely* regarded as *being* substantially limited. This language indicates that the Senate contemplated that individuals who had controlled conditions and as a result were not in fact substantially limited would not be covered by part A of the "disability" definition. As the Report indicates:

> Another important goal of the third prong of the definition is to ensure that persons with medical conditions *that are under control,* and that therefore do not *currently* limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S.Rep. No. 101-116, at 28. (emphasis added).[5]

The legislative history also underscores the plain language of the ADA that requires an individual to be substantially limited *in fact* in order to be covered by part A, thereby further verifying that Congress contemplated taking mitigating measures into account when ascertaining whether a disability exists. The Committee Reports state unequivocally that "[a] physical or mental impairment does not constitute a disability under the first prong of

[5] Senators Harkin, Dole, and Kennedy argue as *amicus* that this provision was not meant to suggest mitigating measures should be considered in ascertaining whether an individual has a disability. However, as this Court has previously held, "Legislative observations 10 years after passage of the Act are in no sense part of legislative history." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 202 (1977).

the definition for purposes of the ADA unless its severity is such that it results in a 'substantial limitation' of one or more major life activities." H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22. Evidence that the statute requires a current, functional analysis of limitation is demonstrated in an example in the Committee Reports:

> A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.

H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22.

This example confirms that Congress was focusing not on the hypothetical, but on how the individual actually is limited on a functional level in performing the major life activity. As one commentator noted, the "hypothetical approach is counterintuitive; legislative history and statutory provisions of the ADA do not support it." Erica W. Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search For the Meaning of Disability*, 73 *Wash. L. Rev.* 575, 580 (1998). Thus, putting the question of whether mitigating measures should be considered in the context of the overall guidance provided by Congress with regard to interpreting the definition of a disability, it becomes evident that Congress meant only for individuals functionally challenged to obtain protections under part A of the definition of a disability. Individuals who by virtue of medication or other devices are not substantially limited do not fall within the category of individuals to be protected.

B. The Court Should Not Defer to EEOC's Interpretive Guidance

1. *EEOC's Interpretive Guidance Is Not Entitled to Deference Because It Is Manifestly Contrary to the Statute*

Petitioners argue that the EEOC's interpretive guidance should be accorded deference under the so-called *Chevron* doctrine, which requires that a court defer to permissible agency statutory constructions where the statute itself is silent or ambiguous. *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Even assuming that the *Chevron* doctrine applies to agency interpretive rules, however, the EEOC rule at issue here would fail to meet the *Chevron* test. This is because the first prong of the *Chevron* analysis—the prerequisite for invoking the deference doctrine—requires that the statute be silent or ambiguous on the issue subject to the agency regulation.

> First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the courts is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43. *See also, I.N.S. v. Cardoza Fonseca,* 480 U.S. 421, 447-48 (1987). As explained above, the plain language of the ADA requires that the phrase "substantially limited" be assessed in light of the corrective measures available to the impaired individual.

Consequently, the petitioners' invocation of *Chevron* is inapplicable.

2. *The* Chevron *Doctrine Does Not Apply to Interpretive Rules*

Even if the Court were to find the statutory provisions at issue ambiguous, the *Chevron* doctrine should not apply to the EEOC rule at issue in this case. This is because the rule in question was promulgated not as a regulation or "legislative rule," but rather, as an "interpretive rule." This Court should definitively hold that the *Chevron* doctrine does not apply to interpretive rules.

The majority of the circuits that have addressed this issue have concluded that *Chevron* deference should not be accorded to interpretive rules. *Cent. Midwest Interstate Low-Level Waste Comm'n v. Pena,* 113 F.3d 1468, 1473 (7th Cir. 1997) ("we do not apply *Chevron's* "rubber stamp" to interpretive rules"); *Jacks v. Crabtree,* 114 F.3d 983, 985 n.1 (9th Cir. 1997) (*Chevron* applies to legislative rules, not policy guidance), *cert. denied,* 118 S. Ct. 1196 (1998); *Southern Ute Indian Tribe v. AMOCO Prod. Co.,* 119 F.3d 816, 833 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds,* 151 F.3d 1251 (1998), *cert. granted,* 119 S. Ct. 899 (1999); *Massachusetts v. FDIC,* 102 F.3d 615, 621 (1st Cir. 1996) (policy pronouncements less formal than legislative rules "are not accorded full *Chevron* deference"); *Washington,* 152 F.3d at 470-471 (interpretive rules not accorded *Chevron* deference).[6]

These courts prudently have concluded that such rules "are entitled to less deference than published regulations because they are not promulgated subject to the rigors of the Administrative Procedure Act, 5 U.S.C. § 553, includ-

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[6] *But see Herman v. Nationsbank Trust Co.,* 126 F.3d 1354, 1363-64 (11th Cir. 1997), *cert. denied,* 119 S. Ct. 54 (1998); *Elizabeth Blackwell Health Ctr. for Women v. Knoll,* 61 F.3d 170, 182 (3d Cir. 1995), *cert. denied,* 516 U.S. 1093 (1996).

ing public notice and comment, and 'are merely internal guidelines [that] may be altered by the [agency] at will.' " *Jacks*, 114 F.3d at 985 n.1 (citations omitted). The Tenth Circuit explained the danger of according *Chevron* deference to agency interpretive rules as follows:

> [A] practice of routine acceptance for interpretations expressed in [informal] formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats. And since these formats are exempt from APA public participation requirements, *an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when applied to them.*

Southern Ute Indian Tribe, 119 F.3d at 833 (citation and footnotes omitted) (emphasis in original). Indeed, applying the *Chevron* rule to interpretive guidance effectively would render the notice and comment requirement of the APA nugatory, as agencies could issue legally binding mandates on nothing more than the political whims of the administrators.

For organizations such as EEAC, the Chamber, and MMA, such a rule would be highly troubling. Companies are highly regulated by numerous federal agencies. The notice and comment procedure of the APA provides companies the only available avenue to help shape policies that will greatly affect their operations. The absence of strict adherence to this requirement will lead to regulation by ambush. Based on these considerations, "the better-reasoned opinions" hold that interpretive rules are not entitled to *Chevron* deference. Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise § 3.5 at 55 (1998 Supp.).

In February 1991, when EEOC published its proposed ADA rules and guidance, the agency made no reference to the substantive rule of law that it now proclaims—that the phrase "substantially limited" must be made without regard to corrective devices or mitigating measures. 56 Fed. Reg. 8593 (1991). It was not until EEOC issued its final interpretive guidance, after all opportunity for comment by the regulated community had expired, that EEOC announced this purported rule of law. This is precisely the sort of danger that the Administrative Procedure Act was designed to prevent, and it is why this Court should refuse to accord *Chevron* deference to agency interpretive rules.

Although this Court has recognized that interpretive rules should be shown "some" deference where more than one interpretation of the statute is permissible, *Reno v. Koray*, 515 U.S. 50, 61 (1995), the Court has concluded that "interpretive rules . . . do not have the force and effect of law, and are not accorded that weight in the adjudicatory process." The weight accorded such rules is directly proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under this standard of review, no deference should be given to the interpretive rule at issue in this case.[7]

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[7] We also note that EEOC's guidance is internally inconsistent on this point, further reducing the deference that the Court should accord these rules. As noted above, the agency's Interpretative Guidance asserts that the evaluation of an individual's impairment should take place without regard to any mitigating measures taken. Yet, in its explanation of what "regarded as substantially limited" means, the agency states as follows:

> [T]he individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment. For example: an employee has controlled high blood pressure which does not substantially limit his work

C. At a Minimum, This Court Should Hold That the ADA Does Not Cover Individuals With Controlled, Minor Impairments That Are Widely Shared

Even if this Court determines that controlling measures should not be a factor in determining whether an individual is substantially limited, this Court should limit such a ruling as applicable only to serious impairments, as opposed to minor impairments that are common and easily controlled. If this Court extends ADA protection to individuals with impairments that are easily correctable and unremarkable, such as high blood pressure that can be controlled with medication, or poor vision that can be controlled by wearing ordinary eyeglasses, it will diffuse the protections given to those individuals actually in need of the ADA's protection, those individuals with true disabilities. Individuals with readily correctable impairments simply are not "substantially limited" compared to the average person. Indeed, in determining whether an impairment is substantially limiting, it "is to be measured in relation to normalcy, or in any event, to what the average person does." *Solileau v. Guilford of Maine*, 105 F.3d 12, 15-16 (1st Cir. 1997). The Second Circuit has emphasized that the Rehabilitation Act does not cover minor impairments that are not unusual:

> It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose *relative severity of impairment* was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.

activities. If an employer reassigns the individual to a less strenuous job because of unsubstantiated fear that the person would suffer a heart attack if he continues in the present job, the employer has "regarded" this person as disabled.

29 C.F.R. App. § 1630.2(1). Thus, EEOC's own example implicitly recognizes that if a condition can be "controlled," the individual may not be substantially limited.

Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (emphasis added) (quoting *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

Even two of the courts of appeals that have deferred to the EEOC guidance on the question of mitigating measures limited their rulings to suggest that the guidance is not necessarily applicable when minor or widely shared impairments are at issue. The Fifth Circuit held that the EEOC's interpretative guidance and legislative history suggested mitigating measures should *not* be considered in finding that an individual with Adult Stills Disease had a disability,[8] but limited its holding as applicable only to "serious impairments and ailments:"

> There is nothing in the Interpretative Guidelines or the legislative history that suggests that *all* impairments must be considered in their unmitigated states and *no* mitigating measures may ever be taken into account. We hold that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 470 (5th Cir. 1998).

Likewise, the First Circuit, which also determined that an individual with diabetes mellitus should be evaluated without the use of mitigating measures to determine if he had a disability, "venture[d] no opinion as to whether [it] would reach the same conclusion if other medical conditions or other facts were presented." *Arnold v. UPS*, 136 F.3d 854, 866 (1st Cir. 1998). The First Circuit sug-

[8] The Fifth Circuit reached this conclusion despite the fact it felt that the argument that mitigating measures *should* be taken into account "offered the most *reasonable* reading of the ADA." *Id.*

gested that it might take a different approach if a non-serious condition was at issue:

> For example, we might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses. The availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of "minor trivial impairment," Senate Report at 23, that would not be considered a disability under the ADA.

Id. at n.10.

Thus, even the courts that have taken the position that mitigating measures should not be a factor in determining whether an individual is substantially limited only take this position so far. These courts acknowledge that to establish standing under part A of the ADA's definition of a "disability," a condition should not be shared by a significant portion of the general population. Therefore, at the very minimum, this Court should endorse Congress' intent that the ADA does not cover individuals with minor, widely shared impairments that are readily and easily correctable.

D. A Ruling That the Use of Corrective Measures Should Be Considered In Determining Whether An Individual Is Substantially Limited Will Not Discourage the Use of Corrective Measuress

Petitioners and several of their *amici* argue that a holding that corrective measures are to be taken into account to ascertain whether a disability exists will encourage individuals to refrain from using corrective measures in order to obtain the Act's protections. This argument is specious for several reasons.

First, the purpose of the ADA is to create a level playing field for individuals with and without disabilities. *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666

(7th Cir. 1995). Essentially, Congress designed the ADA to help those individuals who could not help themselves, not to give special privileges to individuals who could control the effects of an impairment but chose not to. Indeed, part of Congress' findings in passing the ADA includes the following:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are *beyond the control of such individuals* and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(A)(7) (emphasis added). To argue that the ADA's protections provide an incentive to forego medical treatment is clearly counter to the purpose of the ADA.

Moreover, the argument that the consideration of controlled measures in determining whether an individual has a disability will prevent self-help, taken to its extreme, suggests that the ADA could motivate individuals to inflict injuries on themselves to obtain the Act's protections. It is difficult to believe that individuals would act in such an irrational manner. As one commentator pointed out:

> Most obviously, rational people will not cease to mitigate their impairments because the cost of living with an impairment that substantially limits a major life activity, even when combined with the added benefit of more generous ADA protection, is far greater than the cost of undertaking such measures. Rational individuals would pay a hundred dollars per month for medication that would enable them to live free of severe pain rather than sit at home

> in pain to save a thousand dollars per month and receive the benefits of ADA protection.

Harris, *supra*, at 600-601.

Ms. Harris also observes that an individual who chooses not to control his or her impairment may not be able to perform the essential functions of a job, with or without a reasonable accommodation and thus will not be "qualified" under the ADA. *Id. See also* 42 U.S.C. § 12111(8). Indeed, as the Eighth Circuit recently decided, a police recruit who failed to control his diabetes with medication was not a qualified individual with a disability and therefore could not establish a cause of action under the ADA. *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). *See also Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995) ("When an employee knows that he is afflicted with a disability but needs no accommodation from his employer, and fails to meet the employer's 'legitimate job expectations,' due to his failure to control a controllable disability, he cannot state a cause of action under the ADA.") (citation omitted).

An individual's efforts to control the effects of an impairment do not automatically disqualify the individual from the Act's protections. However, "an individual's use of medication, or even a prosthetic limb, is part and parcel of their condition. Thus, if as part of that condition, they are capable of performing major life activities the same as an individual without the condition, they are not actually 'substantially limited' from performing a major life activity and therefore are not protected by the ADA." Adam C. Wit, *Should "Mitigating Measures" Be Considered in the "Disability" Analysis under the ADA?* 24 Empl. Rel. L. J. 73, 88 (Summer 1998). The notion that individuals will avoid self-help simply to achieve the Act's protections is unpersuasive and should not be endorsed as a legitimate reason to expand the protections of the statute beyond its intended reach.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYERS DID NOT "REGARD" THE PETITIONERS AS DISABLED

A. The ADA Requires That a Plaintiff Establish That an Employer Regarded the Individual as Substantially Limited in a Major Life Activity To Establish That the Individual Is "Regarded As" Disabled

An individual also can establish that he or she has a disability under the ADA by showing that he or she was "regarded as" having an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(C) (hereinafter referred to as the "regarded as" prong).[9] Thus, it is not sufficient for a plaintiff simply to allege that he or she is "regarded as" having an impairment to establish standing under the "regarded as" prong of the statute. Rather, the plaintiff must show that the employer regarded him or her as having an impairment that substantially limits a major life activity. "As with real impairments, . . . a perceived impairment must be substantially limiting and significant." *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997), *citing Gordon v. E.L. Hamm & Assoc., Inc.*, 100 F.3d 907, 913 (11th Cir. 1996).

1. *The Perception That an Individual Is Unable To Perform a Particular Job Does Not Translate Into a Perception That the Individual Is Substantially Limited*

The majority of cases brought by plaintiffs under the "regarded as" prong of the ADA rest on allegations that

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[9] Congress emphasized that this prong was designed to protect the individual who was not hired because of the "negative reactions" of employers, and adopted the rationale used in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which this Court concluded that Congress drafted the Rehabilitation Act to address the fact that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from the actual impairment." H.R. Rep. No. 101-485, pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. at 335.

the plaintiff is regarded as substantially limited in the major life activity of "working" because the individual was denied a job opportunity as the result of an impairment. However, as the Fifth Circuit has observed, "[a]n employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job." *Pryor v. Trane Co.*, 138 F.3d 1024, 1028 (5th Cir. 1998). Nor does working mean "working at a particular job of that person's choice." *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995). *See also* 29 C.F.R. App. § 1630.2.

Rather, "a finding that a plaintiff is substantially limited in working requires a showing that her overall employment opportunities are limited." *Miller v. City of Springfield*, 146 F.3d 612, 614 (8th Cir. 1998). *See also Baulos v. Roadway Exp. Inc.*, 139 F.3d 1147, 1151 (7th Cir. 1998) ("It is now well-established that an inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work; rather, the impairment must substantially limit employment generally.")[10] Thus, it is not enough that a plaintiff simply allege that he or she is precluded from a particular job to establish a claim under the "regarded as" prong of the ADA based on a limitation in working. Instead, an individual must establish that the employer regards the individual as substantially limited in a broad range of job opportunities.

Applying this logic, the Eleventh Circuit found that an individual who had a personality disorder and therefore

[10] Courts interpreting the Rehabilitation Act also have concluded that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not *substantially* limiting within the meaning of the statute." *Jasany v. United States Postal Service*, 755 F.2d 1244, 1248 (6th Cir. 1995) (emphasis in original).

was denied FAA Class I Medical Certification was not substantially limited in the major life activity of working merely because he could no longer fly a commercial aircraft. *Witter v. Delta Air Lines*, 138 F.3d 1366, 1370 (11th Cir. 1998). In making such a finding, the court observed that

> there are non-pilot jobs which utilize "similar training, knowledge, skills or abilities as piloting jobs." Such jobs include pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.

Id.[11]

Thus, rejection from a person's job of choice is not enough to establish an individual is substantially limited in the major life activity of working. Rather, an individ-

[11] Indeed, the EEOC uses the following example to demonstrate the concept of someone not substantially limited in the major life activity of working:

> A person who cannot qualify as a commercial airline pilot because of a minor vision impairment, but who could qualify as a co-pilot or a pilot for a courier service, would not be considered substantially limited in working just because he could not perform a particular job. Similarly, a baseball pitcher who develops a bad elbow and can no longer pitch would not be substantially limited in working because he could no longer perform the specialized job of pitching baseball.

EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act* II-6 (1992). Conveniently, the EEOC argues as *amicus* in these cases that this example does not apply because the petitioner disputes it and because the example assumes that an individual could obtain a co-pilot position. What the EEOC overlooks, however, is that the example also states the individual could qualify for a co-pilot or pilot for a courier service. Indeed, the plaintiffs in *Sutton* do currently fly planes. Thus, the example demonstrates that an individual, who is not completely precluded from utilizing his or her training, education, and job abilities, is not substantially limited in the major life activity of working.

ual must be precluded from the universe of jobs open to the individual in question based on that individual's skills and training. *See McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 373 (6th Cir. 1997) (A plaintiff is not substantially limited in working, when "the condition does not significantly restrict her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.") Congress did not intend to give individuals the opportunity to establish a "regarded as" case against an employer simply because an impairment precluded them from performing a specific job they wanted. Rather, the "regarded as" prong protects only individuals who have impairments that limit them, due to "myth or stereotype," from performing major life activities as compared to the general population. The specialized activities of flying commercial planes or holding DOT licenses are not the types of activities most individuals are regarded as having the capability to perform.

2. *An Employment Rejection Based on a Medical Condition Is Not Enough To Establish an Issue of Fact That an Employer Regarded an Individual as Disabled*

Petitioners and several of their *amici* assert that when an employer rejects an individual from employment based on a medical condition, an issue of fact is created that the employer regards the individual as disabled. This argument ignores the requirement that a plaintiff show the employer regards the individual as having an impairment that substantially limits a major life activity in order to establish a "regarded as" case.

Numerous courts have rejected the notion that an individual can establish a "regarded as" claim only because he or she was denied employment opportunities based on physical standards. In *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996), the Eighth Circuit

found that the plaintiff failed to create a genuine issue of fact as to whether the city regarded him as having a disability when he was removed from a firefighter position because he failed to meet the required standards on a breathing capacity test. In finding that Smith was not regarded as being unable to perform any other jobs except that of a firefighter, the court noted that Smith had gone back to school and had taken another job when on leave from the fire department. *Id. See also Bridges v. City of Bossier*, 92 F.3d 329, 336 (5th Cir. 1996) (an individual with hemophilia who could not hold a firefighting position as a result of failure to meet physical qualification standards was not "regarded as" disabled), *cert. denied*, 519 U.S. 1093 (1997).

Similarly, in interpreting the Rehabilitation Act, the Fifth Circuit found that an employer does not regard an employee as disabled merely because the employee fails to meet physical standards patterned on Department of Transportation regulations. *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1101 (1994). The Fifth Circuit noted that "[a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general." *Id.* at 1393.

Courts also have rejected a "regarded as" claim when an individual was denied employment opportunities based on limitations imposed by an individual's own physician. In *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), the Ninth Circuit rejected a "regarded as" claim by an individual who could not lift more than 25 pounds due to a work related injury and who eventually was terminated because she could not perform the essential functions of the job. The Ninth Circuit confirmed that, "an employer's decision to terminate an employee

'based upon the physical restrictions imposed by [her] doctor . . . does not indicate that [the employer] regarded [her] as having a substantially limiting impairment.'" *Thompson*, 121 F.3d at 541, *citing Wooten*, 58 F.3d 382, 386 (10th Cir. 1995).

The ADA requires that individuals be *perceived as substantially limited* to obtain the Act's protections. To establish a rule that anyone with an impairment can always establish standing under the "regarded as" prong of the ADA based solely on a qualification standard involving physical criteria expands the Act beyond its intended reach. A decision to reject an individual solely based on a physical standard or a medical condition is a determination of whether an individual is qualified for a particular employment position, not that the individual is necessarily perceived as substantially limited in general.

B. A Ruling That a "Regarded As" Claim Can Be Established Based on Medical or Physical Criteria Used in Rejecting an Individual From an Employment Opportunity Will Restrict Significantly an Employer's Ability To Establish Job Qualifications

To allow an individual to establish a "regarded as" claim simply because an individual was rejected from an employment position because he or she could not meet the employer's criteria would unduly restrict employers from maintaining qualification standards in the workplace. The costs of litigating the standard every time an individual suffered an adverse job action would be prohibitive. It is difficult to believe that Congress intended such a result. Indeed, as EEAC and the Chamber argued in their brief to this Court in *Albertsons v. Kirkingburg*, 98-591, employers should be able to rely on physical criteria to establish job qualifications if consistent with business necessity. *See* 42 U.S.C. § 12113(a). Whether or not a qualification standard is consistent with business necessity, however, does not translate into a right to sue

under the "regarded as" prong of the ADA's disability definition.

According to Petitioners' logic, any employee rejected for a job based on a medical condition or impairment could maintain standing to sue an employer without any showing that the employer believed the individual was substantially limited in a major life activity. A hypothetical demonstrates this result. Two individuals apply for a lead in a Broadway musical. Both have dreams of stardom and both have taken voice lessons. One has a poor voice because of a throat disorder while the other has a poor voice because of bad luck. The producer rejects both individuals because of a simple belief that neither individual has a voice that is of sufficient quality to participate in the musical, not because she believes—or even considered—that one or both of the individuals has a throat disorder. Petitioners' argument would support the notion that the producer could not reject either applicant without risking a "regarded as" claim.

While this example simply involves public taste, the cases before the Court involve public safety. Employers develop standards such as these to maintain a workforce that exceeds the physical qualifications of the average individual. Therefore, *both* the average member of the general population and the individual who is substantially limited compared to the average member of the general population will be precluded from such employment opportunities. This preclusion does not equal a "regarded as" claim according to the statutory definition of a "disability" which requires some evidence that the individual was "regarded as" substantially limited.

A ruling that a "regarded as" claim exists simply because employers have relied on medical information about the employee, or simply utilized physical criteria in developing job qualifications, will deter employers from developing legitimate job qualifications, hindering a com-

pany from effectively doing business. This Court should not permit such a result.

CONCLUSION

For the foregoing reasons, *amici* the Equal Employment Advisory Council, The Chamber of Commerce of the United States of America, and the Michigan Manufacturers Association respectfully submit that the decisions below should be affirmed.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Attorneys for *Amicus Curiae* The Chamber of Commerce of the United States of America

J. WALKER HENRY
CLARK HILL P.L.C.
500 Woodward Avenue, Suite #3500
Detroit, MI 48226
(313) 965-8300
Attorneys for *Amicus Curiae* Michigan Manufacturers Association

ANN ELIZABETH REESMAN
CORRIE L. FISCHEL *
McGUINESS & WILLIAMS
1015 Fifteenth St., N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for *Amicus Curiae* Equal Employment Advisory Council

* Counsel of Record

Supreme Court, U.S.
FILED
MAR 23 1999
OFFICE OF THE CLERK

Nos. 97-1943 and 97-1992

IN THE

Supreme Court of the United States

October Term, 1998

Karen Sutton and Kimberly Hinton,

Petitioners,

v.

United Air Lines, Inc.,

Respondent.

and

Vaughn L. Murphy,

Petitioner,

v.

United Parcel Service, Inc.

Respondent.

On Writs of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICUS CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

Of Counsel:
Thomas J. Walsh, Jr.
Timothy S. Bland
FORD & HARRISON, LLP
6750 Poplar Avenue, Suite 600
Post Office Box 171375
Memphis, Tennessee 38187-1375
(901) 756-1550

David S. Harvey, Jr.
FORD & HARRISON, LLP
205 Brush Street
Post Office Box 1427
Tampa, Florida 33601
(813) 229-6481

Peter J. Petesch
Counsel of Record
FORD & HARRISON, LLP
1920 N Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 463-6633

Counsel for Amicus

March 23, 1999

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Petitioners' proposed rule, to disregard the actual, salutary effects of ameliorating treatments in determining "disability" status and "substantial limitations," is unworkable and ignores Congressional intent and the ADA's express language. 4

A. By Petitioner's Approach, Most Americans Have "Disabilities" Under The ADA 4

B. Considering The Individual's Actual Substantial Limitations is Most Consistent With the ADA's Definition of "Disability" 8

II. Legislative history, other EEOC interpretations, and the record of the ADA in practice support Respondents' position 11

III. Considering mitigating measures will still protect persons with disabilities. 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: **Page[s]**

Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 141 L.Ed 2d 540 (1998) 8,14,15,17

Buko v. American Medical Laboratories, 830 F. Supp. 899 (E.D. Va. 1992), *aff'd* 28 F.3d 1208 (4th Cir. 1994) 7

Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), *reh'g, en banc, denied*, 9 F.3d 105 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994) 14

Christian v. St. Anthony Medical Center, 117 F.3d 1051 (7th Cir. 1997), *cert. denied*, —U.S.—, 118 S. Ct. 1304 (1998) 12

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986) 7

Gilbert v. Frank, 949 F.2d 637 (2nd Cir. 1991) 14

Halperin v. Abacus Technology Corp., 128 F.3d 191 (4th Cir. 1997) 13

Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928 (7th Cir. 1995) 11

Mackie v. Runyon, 804 F.Supp. 1508 (M.D. Fla. 1992) 14

McDonald v. Pennsylvania, 62 F.3d 92 (3rd Cir. 1995) 13

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 13

Tiff v. Secretary of Transp., 1994 WL 579912 (D.D.C. 1994) 14

Trembczsynski v. City of Calumet City, 1987 WL 16604 (N.D. Ill. 1987) 13

Page[s]

STATUTES, REGULATIONS AND RULE:

Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq* 1, 4, 5, 7, 8, 10, 15

EEOC Policy Guidance on Reasonable Accommodation Under ADA, March 1999, Question 5 12

EEOC Policy Guidance on Reasonable Accommodation Under ADA, March 1999, Question 22, example A 18

EEOC Policy Guidance on Reasonable Accommodation Under ADA, March 1999, Question 38 ..... 12, 13

EEOC Policy Guidance on Psychiatric Disabilities, March 1997 13

Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et. seq* 17

Occupational Safety and Health Act, 29 U.S.C. §§ 561, *et. seq.* 17

29 C.F.R. Pt. 1630:

App. 1630.2 (j) 5, 9, 13

App. 1630.2 (l) 10

App. 1630.2 (m) 11

29 C.F.R. § 1630.2 (g) 12

29 C.F.R. § 1630.2 (j) 9, 15

29 C.F.R. § 1630.9 (a) 12

42 U.S.C. § 12101 (a) 4

42 U.S.C. § 12101 (a) (7) 5, 7

42 U.S.C. § 12102 (2) (A) 8, 15

42 U.S.C. § 12102 (2) (C) 10

Supreme Court Rule 37.3 1

Page[s]

MISCELLANEOUS:

Caring for the Eyes of America, the annual report of the American Optometric Association, St. Louis, Missouri (1998).....4

H.R. Rep. No. 101-485 pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 11

S. Rep. No. 101-116 at 22-23, 24 (1989) 12

58 Fed. Reg. 64356 (1993)..... 6

58 Fed. Reg. 5524 (1993)..... 6

INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM"), the voice of human resource professionals for over 50 years, submits this brief in support of Respondents United Air Lines and United Parcel Service.[1] SHRM represents over 113,000 human resource professionals in the United States and in 80 other countries. SHRM leads, educates, and provides a forum for human resource professionals regarding matters of critical daily importance to managing employees in the workplace. Human resource professionals develop and administer structures to recruit, train, and manage employees in all types of work environments. SHRM and its members are deeply concerned with understanding and implementing all non-discrimination and equal opportunity laws and principles in the workplace.

In this particular case, SHRM's members are typically the persons involved in implementing, administering and training on non-discrimination policies covering employees with disabilities, guarding employees' medical information, and developing reasonable accommodations under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Grasping the ADA's fluid requirements, especially in light of inconsistent EEOC interpretations and conflicting court rulings, poses a unique challenge to SHRM members and anyone managing disabilities in the workplace.

The cases before this Court on the value of mitigating measures and treatments highlight this challenge. Though trained in evaluating job performance and functional limitations of individuals (with or without disabilities), human resource departments and staffs lack the medical training

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[1] *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the written consent of the parties. Evidence of said consent is filed concurrently with this brief. No person or entity other than *amicus curiae*, its members, or its counsel authored any portion of this brief or made any monetary contribution to the preparation or submission of this brief.

necessary to speculate on how physical or mental conditions *would theoretically* affect an individual in the absence of effective treatments that render a person perfectly functional in and out of the workplace. Yet, the rule urged by Petitioners and some *amici* -- that mitigating measures such as medical regimens, auxiliary aids, or common treatments should never be considered in determining whether an individual with a physical or mental impairment is substantially limited in a major life activity so as to have a "disability" under the ADA -- places human resource professionals precisely in this untenable position. The practical experience of SHRM members teaches that such a rule is simply unworkable. Moreover, Petitioners' proposed rule defies the language and intent of the ADA.

SHRM urges the Court to seize this opportunity to formulate a clear and consistent rule, one that protects the interests of the intended beneficiaries of the ADA, that comports with the statutory language and with the EEOC's approach to other aspects of the ADA, and that allows for ease of application in the real world of the workplace, benefitting employers and employees alike. Employees should be assessed solely on the basis of how they actually function, with whatever medical aids they normally use.

SUMMARY OF ARGUMENT

In enacting the ADA, Congress intended to protect the minority of Americans with true physical or mental disabilities who, despite their condition, can function in the world of work. The ADA seeks to bring formerly marginalized persons into the mainstream of society, not *vice versa*. The vast majority of people who wear eyeglasses, or who take medications that fully or substantially relieve the effects of a wide variety of common conditions, are not generally seen as having "disabilities," have not been marginalized, and should not fall within the ADA's special definition of its protected class. In determining who has a "disability" under the ADA, employers and courts should

evaluate persons individually as they actually function, and not speculate on how they might function in some hypothetical state.

The entire language and structure of the ADA bespeak Congress' intent to look to individuals' actual abilities, and to discourage employers from conjuring up imaginary scenarios that only feed stereotypical views of persons with physical or mental impairments as persons who cannot function. Thus the rule urged by Petitioners and the EEOC not only trivializes the ADA's purposes, it works against those purposes. It also places an impossible burden on employers, who lack the resources and medical expertise to predict the potential dysfunctions of a now-functional individual if medications or devices were removed.

The EEOC's interpretations of other aspects of the ADA affirm the guiding principle that any inquiry should focus on actual function and actual "substantial limitations" to the individual's major life activities. Its argument that mitigating measures should not be considered in defining an individual's disability is therefore inconsistent with its overall approach to the ADA. Along with an ambiguous legislative history, this inconsistent approach has in turn led to conflicting court rulings, and to hopeless confusion among employers and employees alike. Again, the Court needs to articulate a clear, simple rule, one that comports with the actual language of the statute, that protects those intended to be protected, and that can be readily applied in the real world of work. This real-world, total-picture approach, one that regards each person as a functioning individual, is far superior to the inflexible, artificial, and confusing definitional scheme that Petitioners seek to advance. It is also truer to the ADA's language and purposes.

The rule SHRM urges will not leave ADA's intended beneficiaries unprotected. Some ameliorative measures, such as medication with severe side effects, may impair an employee's function, or leave the individual still "substantially limited" in his or her major life activities. In

such cases, those effects, too, should be taken into account in a functional-ability test.

ARGUMENT

I. PETITIONERS' PROPOSED RULE, TO DISREGARD THE ACTUAL, SALUTARY EFFECTS OF AMELIORATING TREATMENTS IN DETERMINING "DISABILITY" STATUS AND "SUBSTANTIAL LIMITATIONS," IS UNWORKABLE AND IGNORES CONGRESSIONAL INTENT AND THE ADA'S EXPRESS LANGUAGE.

In several respects, the rule which Petitioners and the EEOC propose runs directly counter to the ADA's purposes as expressed in the statutory language.

A. By Petitioners' Approach, Most Americans Have "Disabilities" Under the ADA.

In its Findings and Purposes accompanying the ADA, Congress hailed the protection of 43 million Americans with disabilities, and declared the laudable goals of eliminating disability discrimination and bringing persons with disabilities into the mainstream of American society. 42 U.S.C. § 12101 (a). Far from bringing persons with disabilities in the mainstream, however, Petitioner's proposed rule would by definition force persons from the mainstream -- indeed, the vast majority of Americans -- into the ranks of persons with "disabilities."

The numbers alone reveal the fallacy of Petitioners' rule. For example, 147 million Americans, or 55% of the population, wear eyeglasses or other corrective lenses.[2] This

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[2] *Caring for the Eyes of America*, the annual report of the American Optometric Association, St. Louis, Missouri (1998). In its amicus brief, the EEOC cites a government study which found that an even higher number of adults -- 63% -- wear eyeglasses or contact lenses. Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners, p. 10, n.1. Other statistics which

does not even include the persons who no longer wear corrective lenses due to successful corrective laser surgery. In most cases, these persons function normally in virtually all occupations. They fly airplanes, drive trucks, and even excel in professional sports. Yet, Petitioners and the EEOC declare that ameliorating measures should not be taken into account in determining whether an individual has a "disability" under the ADA.[3] By this interpretation, conceivably 55% of the U.S. population -- individuals *without* their corrective lenses, a great many of whom could not function normally in their present jobs without eyesight correction -- falls within ADA coverage. Congress could not have intended to afford the ADA such a wide sweep.[4]

Indeed, the example of corrective lenses represents only the tip of the iceberg.

- The American Heart Association estimates that 96.8 million American adults (51%) have high cholesterol levels. Often, this condition is successfully controlled by cholesterol-lowering medication.
- As many as 50 million Americans have hypertension, according to the American Heart Association. Many take blood pressure medication that completely controls their condition.

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appear below were derived from the official websites of the organizations cited: The American Heart Association (www.amhrt.org); the National Center for Health Statistics (www.cdc.nchswww/default.htm); the American Psychiatric Association (www.psych.org).

[3] The EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act, an appendix to the EEOC's regulations, opines that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. 1630.2 (j). The regulations themselves are silent on the issue.

[4] Congress viewed persons with disabilities as a "minority of the population." 42 U.S.C. § 12101 (a) (7).

- Nearly 15 million Americans have asthma, according to the National Center for Health Statistics. A large number of asthma sufferers function normally with the use of an inhaler to alleviate their condition.
- According to the American Psychiatric Association, in any six-month period 9.4 million Americans suffer from depression. One in four women and one in ten men can expect to develop it during their lifetime. As many as one in five Americans will suffer at least one episode of *major* depression during their lifetimes. Of those who suffer from depression, 80-90% can be effectively treated. Many persons who take antidepressants can and do remain fully functional.
- 28 million Americans have some degree of hearing loss -- but just over 2 million are profoundly deaf. (58 Fed. Reg. 64356 (1993)). Many millions of these individuals are fully functional, sometimes with hearing aids.
- The American Heart Association reports that approximately 8.7 million Americans have diabetes, with 625,000 new cases diagnosed each year. Most diabetics live relatively normal lives through the use of insulin and/or dietary measures.
- 37 million Americans have some form of arthritis (58 Fed. Reg. 5524, 5526-27 (1993)). Many take over-the-counter pain relievers and function fully.
- Many persons with seizure disorders take medication that fully controls their condition (i.e., they have not had a seizure in 10 years).
- Millions of persons with psychological needs are rendered fully functional by professional counseling.

- Persons with heart arrhythmia take anticoagulants to minimize the risk of a heart attack, and live and work as part of mainstream America.

These are but a few examples of persons with *potentially* debilitating conditions who, thanks to modern medicine, pursue normal lives and work in every kind of job imaginable. By and large, society does not view such persons as these, fully functional in all or virtually all respects, as having "disabilities." To do otherwise in order to stretch a statutory definition, as Petitioners and the EEOC urge, trivializes the ADA and its purposes. Worse, such a broad-brush approach distracts attention from the ADA's intended beneficiaries, those who truly have disabilities but who can still work and make significant contributions to society. A statute that protects everyone protects no one. Moreover, such indiscriminate labeling tends to heap suspicion and ridicule on the very persons whom the statute seeks to protect. This result runs directly counter to Congress's stated intent to protect individuals with disabilities from unequal treatment "based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. §121101(a)(7).

In sum, with the ADA, Congress intended to protect a limited class of persons: specifically, those who suffer from substantial limitations significantly more severe than those encountered by the average person in everyday life, *not* those who suffer from relatively minor, widely shared non-limiting conditions. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (to hold otherwise would "debase" the "high purpose" of a statute that seeks to protect "those truly handicapped"); *Buko v. American Medical Laboratories, Inc*, 830 F. Supp. 899, 904 (E.D. Va. 1992), *aff'd* 28 F.3d 1208 (4th Cir. 1994). In order to serve these legislative purposes, and to discourage rather than to feed negative stereotypes that the statute decries, employers and courts should consider individuals in

their actual state, with their *actual* substantial limitations, if any, and not in a hypothetical condition.

B. Considering the Individual's Actual Substantial Limitations is Most Consistent with the ADA's Definition of "Disability."

The ADA defines an actual disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102 (2) (A). It does not say an individual has a disability if he or she has an impairment that *might* or *could* substantially limit a major life activity.[5] Thus, a plain, common-sense reading of the statute requires a determination of whether an individual is currently or actually "substantially limited." If he or she is not substantially limited because of some reasonable mitigating measure, then that person should not be considered to have a "disability." Any other reading of the statute would not only corrupt its plain meaning, but would place an impossible burden on the lay business persons responsible for adhering to it.

The definition stresses actual function rather than theoretical condition, and individual assessment rather than blanket categorization. As this Court held last term in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L.Ed 2d 540 (1998), a physical impairment, including poor vision, must first be "substantially limiting" to the individual in order to rise to the level of "disability." 141 L.E.2d at 557 and 141 L.Ed.2d at 574 (O'Connor, concurring in the judgment in part and dissenting in part). Although a nearsighted person whose vision is corrected to 20/20 by corrective lenses, or a person with asthma who uses an inhaler, may have a "physical

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[5] Ignoring the beneficial effects of medical treatments, as Petitioners and the EEOC urge, reduces the statutorily-mandated disability equation to speculation and stereotypes about an impairment. If Congress wished to link protection to impairments alone, it would have -- but Congress instead added the individualized inquiry on "substantial limitations" to the disability definition.

impairment," neither impairment is, in reality, "substantially limiting" with respect to major life activities, thanks to simple medical devices. For all practical purposes, millions of persons benefitting from salutary effects of modern medicine are no different from the mythical "average person" -- against whom "substantial limitations" are measured. See 29 U.S.C. § 1630.2 (j) (1) (i) and (ii). Indeed, at 55% of the population (or 63% of adults), the "average person" uses corrective lenses.

Yet, Petitioners and the EEOC advocate imagining these persons in a theoretical condition, without their eyeglasses or inhalers. The EEOC's vacillating position in this very case illustrates the impossibility of maintaining one's balance on this logical tightrope. In its Certiorari Brief in *Sutton*, the EEOC correctly conceded that both the *Sutton v. United Air Lines* and the *Murphy v. United Parcel Service* cases present the identical question on "whether the existence of an *actual* disability under the ADA is to be assessed with or without taking into consideration mitigating or ameliorative measures employed by the individual involved." U.S. Brief as Amicus Curiae on the Petitions for Writs of Certiorari at 8 (emphasis added); *see also id.* at 13. The EEOC then argued that *Murphy* was the better vehicle to address the issue, or that the situation raised in *Sutton* should be avoided, because the example of correctable vision in *Sutton* may pose a "special" exception. *Id.* at 8, 13-14, fn. 3. The EEOC offered no reasoned explanation why mitigating measures should be considered only in the case of correctable vision impairments. Indeed, given the wide variety of accessible medical treatments for a wide variety of impairments, the same reasons that support creation of a "special exception" for corrective lenses also call for consideration of mitigating measures in many other cases. Apparently recognizing that this argument exposed the fatal flaws in its entire position, the EEOC then reversed field in its *amicus* briefs and argued against treating corrective lenses as an exception. The EEOC's own shifting positions beg the question of whether other measures which not only alleviate certain symptoms of

an impairment, but which virtually eliminate any "substantial limitations" emanating from the impairment, can be ignored in applying a statute dedicated to mainstreaming, and not segregating, persons with "disabilities." Such measures should not be ignored. They affect the way people actually function, as well as the way people are perceived as functioning.

This leads to yet another dissonance between the EEOC's position and the ADA's language. As the third prong of the ADA's definition of "disability" stresses, the *perception* of disability where none actually exists creates a new protected class that, but for the active imaginations of others, never had to exist. *See* 42 U.S.C. § 12102 (2) (C) ("disability" means "being regarded as having such an impairment [that substantially limits one or more of the major life activities of such individual]").[6] Under the ADA, then, the employer should focus not on the least that individuals theoretically could do, but rather, on the most they actually *can* do. Yet, the EEOC's approach to mitigating measures would *require* the employer, through an imaginative leap, to perceive as "disabled" a person who functions normally. Thus, even aside from the practical difficulty or impossibility of asking employers to imagine functional persons in a hypothetical, less-functional state, such an exercise runs directly counter to Congress' purposes. Indeed, elsewhere the

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[6] As the EEOC's own interpretive guidance explains, "[a]n individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has *controlled* high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled." 29 C.F.R. Pt. 1630, App. § 1630.2 (l) (emphasis added). Also implicit in this guidance is the EEOC's observation that controlled conditions may not be "disabilities."

ADA and the EEOC encourage employers to view employees in their maximum and actual, present functioning capacity.[7]

In other contexts, including a case involving an employer unaware of an employee's medical condition, courts have correctly surmised that "[t]he ADA does not require clairvoyance." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995). Similar "clairvoyance" should not be required to picture functional persons as "substantially limited."

II. LEGISLATIVE HISTORY, OTHER EEOC INTERPRETATIONS, AND THE RECORD OF THE ADA IN PRACTICE SUPPORT RESPONDENTS' POSITION.

As explained above, the ADA's plain language only mandates protection of those who are "substantially limited," and not persons who "would be" or who are, hypothetically, "substantially limited." Similarly, the ADA's legislative history does not mandate protection of individuals who can function normally with mitigating measures. Indeed, the legislative history itself is inconsistent. At times, it indicates that disability should be determined without regard to mitigating measures. At other times, though, the legislative history indicates that the focus should be on an impairment's *effects* on the individual with the impairment, not on the impairment's qualities, and seems to indicate that it would be appropriate to consider mitigating measures.[8] Thus the

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[7] The EEOC discourages other forms of speculation. As the EEOC's interpretive guidance on qualified persons with disabilities explains, "[t]his determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and *should not be based on speculation* that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs." 29 C.F.R. Pt. 1630, App. § 1630.2 (m) (emphasis added).

[8] Parts of the ADA's legislative history suggest that Congress intended disability to be determined without regard to mitigating measures. H.R. Rep. No. 101-485 pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334. Yet, a Senate report indicated that in determining

legislative history taken as a whole does not preclude consideration of mitigating measures in determining "disability."

The EEOC is equally inconsistent. While the agency argues that mitigating measures should not be taken into consideration when determining whether an individual has a disability, it is perfectly willing to consider mitigating measures in other circumstances under the ADA. For example, in addressing "reasonable accommodations," the EEOC correctly explains that it is the individual's known functional limitations -- and not the underlying "impairment" -- that must be accommodated. 29 C.F.R. § 1630.9 (a). *See also* "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Questions 5, 38.

The glaring contradictions of the EEOC's positions on mitigating measures are most evident its approach to negative side effects of medication. In its Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, the EEOC unequivocally states, "If medications cause negative side effects, these side effects *should be considered* in assessing whether the individual is substantially limited." (emphasis added). *Accord*, *Christian v. St. Anthony Medical Center*, 117 F.3d 1051, 1052 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1304 (1998). The EEOC reiterates this position in its March 1999 Policy Guidance on Reasonable Accommodation Under ADA, explaining that "[t]he side

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whether a disability exists, the focus should be on an impairment's effects on the individual with the impairment, not on the impairment's qualities. S. Rep. No. 101-116 at 22-23 (1989). The same report noted that an individual who wears a hearing aid could be "regarded as" disabled even if the hearing aid compensated for the impaired hearing. Id. at 24. If such an individual were covered under the "substantially limited" language of the definition of disability without regard to the mitigating measure (hearing aid), there would have been no need to look to the "regarded as" portion of the definition. 29 C.F.R. § 1630.2 (g). That is, others' perceptions concerning the hearing aid would be irrelevant unless the individual's hearing were not covered by the "substantially limited" language.

effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability." "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Question 38. By way of example, the Guidance on Psychiatric Disabilities states that if an employee with major depression is often late for work because of medication side effects that make him extremely groggy in the morning, the employer, absent undue hardship, must consider offering a reasonable accommodation such as allowing him to come into work one hour later each day. On the other hand, that same Guidance also unequivocally states that the "corrective effects of medications" should *not* be considered in deciding if an impairment is so severe that it substantially limits a major life activity. It defies logic for the EEOC and ADA claimants to have it both ways. SHRM's approach would eliminate these inconsistencies.

In another nod to practical functionality, the EEOC and the courts have agreed that short-term conditions are not considered "substantially limiting," and thus are not ordinarily classified as handicaps or disabilities covered under the Rehabilitation Act or the ADA. 29 C.F.R. Pt. 1630, App. 1630.2(j); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997); *McDonald v. Pennsylvania*, 62 F.3d 92, 96 (3rd Cir. 1995). Again, the emphasis is on common-sense notions of what constitutes a disability, and the idea that temporary conditions do not qualify. Most people who take medication or wear corrective devices do so on a habitual basis, and any departure from routine is typically brief -- analogous to a temporary condition.[9]

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[9] Rehabilitation Act cases decided prior to the ADA support Respondents' position that ameliorative measures belong in the disability equation. *See Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (evaluated plaintiff in actual, medicated state, not a hypothetical, unmedicated state); *Trembczsynski v. City of Calumet City*, 1987 WL 16604 (N.D. Ill. 1987) (officers do not have "handicaps" if vision is correctable to 20/20). Cases decided under the Rehabilitation Act since ADA offer little if any additional guidance. As under the ADA, courts

Accordingly, taking the ADA's legislative history and pre-ADA cases as a whole, nothing definitively endorses Petitioner's approach or precludes that of Respondent. On the other hand, the checkered history of the ADA in practice strongly commends Respondents' proposed rule. The chaos that preceded the statute has only grown since its enactment. It has spawned a legion of litigation, and has sown discord and confusion among employees as well as employers.[10] A clear and simple rule, such as the one Respondent proposes, will establish a consistent principle that lay persons can understand and follow. It is a rule that employers can live with and employees can work with. Most important of all, it is a rule whose implementation will serve the original purpose of the ADA: to assure that employers, and society as a whole, will view all individuals at their best and not their worst, and as they actually function.

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split on whether to consider mitigating measures in determining handicap are split. See, e.g., *Mackie v. Runyon*, 804 F.Supp. 1508, 1510-11 (M.D. Fla. 1992) (bipolar disorder stabilized by medication is not substantially limiting); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993)(an insulin-dependent diabetic did not have a disability), *reh'g, en banc, denied*, 9 F.3d 105 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994). Cf. *Tiff v. Secretary of Transp.*, 1994 WL 579912, at *3-*4 (D.D.C.1994)(depression controlled by medication was a disability); *Gilbert v. Frank*, 949 F.2d 637, 641 (2nd Cir. 1991)(an individual who could not function without kidney dialysis had a substantially limiting impairment). Thus, although this Court stated in *Bragdon* that the ADA provides no less protection than the Rehabilitation Act, 141 L.Ed.2 at 553, the issue was never conclusively decided under the Rehabilitation Act.

[10] The EEOC argues that adopting SHRM's position "would inject uncertainty and instability into the system. See 97-1943 U.S. Brief at 8; 97-1992 U.S. Brief at 16-17. Yet, actual experience has shown that the EEOC's approach to this issue has itself created that unhappy result. A consistent rule based on actual observation and function, rather than on prediction and speculation, will far more likely contribute to a stable system.

III. CONSIDERING MITIGATING MEASURES WILL STILL PROTECT PERSONS WITH DISABILITIES

Contrary to Petitioners' and the EEOC's contentions, SHRM's approach would not set such a restrictive definition of "disability" as to gut the ADA and leave virtually no individuals subject to its protections. Rather, SHRM's rule prevents ADA compliance from becoming a free-for-all haven for every individual with some minor, correctable physical or mental condition and focuses the ADA's protections on the individuals Congress intended to protect. The effect of each individual's condition, as well as the effect (both good and bad) of any medical treatment or device, should all be taken into account as they affect the ability to function.

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102 (2) (A). "Substantially limits," as defined by the EEOC, means:

> Unable to perform a major life activity that the average person in the general population can perform; or
>
> Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1620.2(j)(1)(i and ii). More significantly, as the Court observed in *Bragdon*, "the Act addresses substantial limitations on major life activities, not utter inabilities." 141 L.Ed.2d at 559. "When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Id.* Under SHRM's proposed interpretation, an employer or court confronted with an individual claiming to have a disability and to be subject to the ADA's protections would first determine if the

employee's abilities during the relevant time period demonstrate a substantial limitation of a major life activity as compared to the "average" person.[11] It is the individual's present ability, as affected by the impairment and any side effects of medication or treatment, that would be the focus of the examination. Courts and employers would not be expected to speculate about what the individual's limitations could be if untreated (or create hypothetical limitations where none currently exist).

Borrowing the EEOC's generalized example used on page 14 of its Amicus Brief in *Murphy v. United Parcel Service, Inc.*, an employee who requires a modification of his work to accommodate an uncontrollable condition would be entitled to the modification (provided it is reasonable, effective and did not cause an undue hardship to the employer). If another employee's condition is somewhat controlled (but still substantially limiting), the employee would also be entitled to reasonable accommodation from the employer. Nevertheless, an employee whose medication eliminates an impairment would not be entitled to an accommodation as none would be needed.[12]

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[11] The EEOC's interpretation creates additional conflicts and questions. For example, when determining what the "average" person can do, are the "average" person's abilities examined with or without mitigating measures? If the "average" person's abilities are examined with mitigating measures, then it is possible that every individual (or a majority of individuals) could be classified as having "disabilities"since they would be substantially limited in some major life activity (without mitigation) that the "average" person could perform (with mitigation). If the "average" person's abilities are examined without mitigating measures, then courts and employers will be forced to speculate twice -- first, with regard to the individual's limitations in the absence of mitigation and, again, with respect to the "average" person's abilities in the absence of mitigation.

[12] The EEOC complains in its example that employers would be free to discharge employees who sought permission to take medication or treatment that eliminates their condition. Such unfounded concerns ignore several key principles. First, the EEOC attempts to paint an improbable

SHRM's proposed standard when applied to real life examples proves that the EEOC's proposed interpretation is unneeded, and that individuals whose condition and/or treatment substantially limits a major life activity will be protected by the ADA. In the case of human immunodeficiency virus ("HIV"), this Court determined that an individual's HIV infection rises to the level of a disability. This Court noted the "predictable and, *as of today*, an unalterable course" of the disease on an individual's immune system. *Bragdon*, 141 L.Ed.2d at 554 (emphasis added). With or without protease inhibitors, part of the combination therapies that help keep many persons with HIV healthy for longer, the retrovirus' genetic material becomes integrated with the chromosomes of the body's cells. *Id.* The latent viral reservoir of HIV slowly attacks the immune system even though anti-retroviral therapies can prolong persons' disease-free states. These particular "mitigating measures" therefore do not eliminate the "substantial limitations" on the major life activities that the Court discussed and appeared willing, but unable, to discuss in *Bragdon*. Moreover, this vigorous medical regimen exacts other real costs and limitations on the individuals undergoing combination therapies. The regimen itself requires strict adherence to diet and medication schedules. Acute side-effects associated with the treatment

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picture of some Orwellian employer who fires employees for taking prescribed medication. The EEOC is attempting to push the protections of the ADA into areas Congress never intended it to cover. Everyone would equally be offended if an employer fired an employee for taking aspirin because the employee had a headache. Yet, an employee with a one time headache who is taking aspirin would not have a "disability" under any standard adopted by the Court. Second, an employee's restricted regimen of treatment (that, for example, required a certain diet and timing for the taking of medication) may substantially limit a major life activity and still allow the employee to be protected by the statute. Finally, Congress and individual states have already adopted legislation protecting the employee's ability to seek and receive medical treatment (such as the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et. seq.*, the Occupational Safety and Health Act, 29 U.S.C. §§ 561, *et. seq.* and state leave and workers compensation laws).

may include nausea, diarrhea, and neuropathy (numbness in the extremities). In the everyday context of the workplace, it is more often these disruptive regimens and the individual side-effects that human resource professionals must accommodate than the underlying viral infection itself.[13] There is every reason to believe that, in viewing the HIV-positive employee in the actual condition that must be accommodated under ADA, the person is still "substantially limited" even with the mitigating treatments and is therefore protected under the ADA.

This example, as in the case of persons with prosthetic legs or using a wheelchair, shows that under SHRM's proposed rule, the persons intended to be protected under ADA may still be "substantially limited," protected, and entitled to reasonable accommodations even when helpful medical treatments and devices -- which affect the actual condition and functional limitations of the individual -- are taken into account.

CONCLUSION

The Court should resolve the inconsistencies in the courts below and the internal contradictions in the Petitioners' and EEOC's position by articulating a clear, simple rule: For purposes of determining "disability" status under the ADA, individuals should be assessed in light of their actual ability to function and any actual "substantial limitation" to their major life activities. The assessment should take into account both the beneficial and detrimental effects, if any, of measures, devices and treatments used to ameliorate or eliminate the condition in question. This principled, common-sense

[13] The EEOC's new guidelines on reasonable accommodations even explain that it is these limitations from treatments that must be accommodated. "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Question 22, example A (citing limitations and side effects from HIV treatment regimen to be accommodated).

approach will facilitate employers' ADA compliance, while also protecting those whom Congress intended to protect.

Respectfully submitted,

Of Counsel:
Thomas J. Walsh, Jr.
Timothy S. Bland
FORD & HARRISON, LLP
6750 Poplar Avenue, Suite 600
Post Office Box 171375
Memphis, Tennessee 38187-1375
(901) 756-1550

David S. Harvey, Jr.
FORD & HARRISON, LLP
205 Brush Street
Post Office Box 1427
Tampa, Florida 33601
(813) 229-6481

Peter J. Petesch
Counsel of Record
FORD & HARRISON, LLP
1920 N Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 463-6633

Counsel for Amicus

March 23, 1999

Supreme Court, U.S.
FILED
APR 29 1999
CLERK

No. 97-1943

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, ET AL.,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF FOR THE RESPONDENT

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
Brownstein Hyatt Farber & Strickland, P.C.
Twenty-second Floor
410 Seventeenth St.
Denver, CO 80202
(303) 534-6335

ROY T. ENGLERT, JR.
MIRIAM R. NEMETZ
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondent

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to S. Ct. Rule 25.6, respondent United Air Lines, Inc., respectfully moves for leave to file the accompanying post-argument brief. This brief is necessary because during the oral argument in *Albertsons, Inc.* v. *Kirkingburg*, No. 98-591, immediately after the argument of this case, the Solicitor General for the first time took the position that an individual must show that he or she has an ***impairment*** to establish that he or she was "regarded [by an employer] as" substantially limited in a major life activity. That contention is directly contrary to an EEOC regulation, 29 C.F.R. § 1630.2(*l*)(3), that might escape the Court's attention but for the filing of this supplemental brief. United has never had the opportunity to respond to the Solicitor General's new contention, which bears as importantly on this case as it does on the *Albertsons* case. We submit that the accompanying post-argument brief would assist the Court in evaluating the Solicitor General's contention.

For the foregoing reasons, the motion for leave to file the accompanying post-argument brief should be granted.

Respectfully submitted.

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
Brownstein Hyatt
Farber & Strickland, P.C.
Twenty-second Floor
410 Seventeenth St.
Denver, CO 80202
(303) 534-6335

ROY T. ENGLERT, JR.
MIRIAM R. NEMETZ
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondent

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LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
Brownstein Hyatt Farber & Strickland, P.C.
Twenty-second Floor
410 Seventeenth St.
Denver, CO 80202
(303) 534-6335

ROY T. ENGLERT, JR.
MIRIAM R. NEMETZ
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondent

TABLE OF AUTHORITIES

Page(s)

Cases

Bragdon v. *Abbott*,
118 S. Ct. 2196 (1998) 2

Forrisi v. *Bowen*,
794 F.2d 931 (4th Cir. 1986) 3

Statutes, Rules and Regulations

29 C.F.R. § 1630.2 2

45 C.F.R. § 84.3 2

42 U.S.C. § 12102(2) 1, 3

42 U.S.C. § 12201 2

29 U.S.C.A. § 705(20) 3

POST-ARGUMENT BRIEF FOR THE RESPONDENT

A central issue presented by this case is whether United's decision to require pilot applicants to have 20/100 or better vision means that it "regard[s] as" disabled all persons whom it rejects because they do not meet those standards. 42 U.S.C. § 12102(2)(C). United has argued that Congress did not intend to require employers to justify all adverse employment decisions based on the physical characteristics of individuals. An employer may use physical characteristics to distinguish one group of ***non-disabled*** people from another group of ***non-disabled*** people without doing that which the "regarded as" prong covers — that is, regarding people who do not have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" (*id.* § 12102(2)(A)) as if they ***did*** "hav[e] such an impairment" (*id.* § 12102(2)(C)).

During the April 28 oral argument in *Albertsons, Inc.* v. *Kirkingburg*, No. 98-591, one or more Justices expressed concern about an interpretation of the "regarded as" prong that would bring within the ADA's protected class ***every*** individual who was turned down for ***any*** job as the result of a physical characteristic. Counsel for both the respondent in that case and the Government were asked for examples of individuals who might be subject to ***unjustifiable*** employment decisions based on physical characteristics but nonetheless would ***not*** be covered by the statute. Assistant to the Solicitor General Edward C. DuMont stated that a person rejected from a job because he had blue eyes would not have a cause of action under the ADA. According to Mr. DuMont, such an individual would not be "regarded as" having a disability because having blue eyes is not an impairment. He contended further that an individual must have an impairment before he can complain that he was "regarded as" disabled by an employer that rejected him.

Mr. DuMont's contention, however, is directly contrary to the EEOC's regulation defining the statutory phrase "is regarded as having such an impairment." According to the regulation, that phrase means:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of attitudes of others toward such impairment; or

(3) ***Has none of the impairments described in paragraph (h)(1) or (2) of this subsection but is treated by a covered entity as having a substantially limiting impairment.***

29 C.F.R. § 1630.2(*l*) (emphasis added). Furthermore, Section 1630.2(*l*) is substantively identical to, among other regulations, 45 C.F.R. § 84.3(j)(2)(iv), a regulation issued by a federal agency pursuant to Title V of the Rehabilitation Act, and therefore ***must*** be followed in ADA cases. 42 U.S.C. § 12201(a); *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202, 2205 (1998) (following a different portion of 45 C.F.R. § 84.3(j)(2)). According to these regulations, a person need not actually have ***any*** impairment (either one that substantially limits a major life activity or one that does not) to claim that he has been subject to adverse employment action because an employer regards him as having a substantially limiting impairment.

The import of this regulation is clear: the "regarded as" prong is ***not*** limited to those who actually have impairments, and the suggested limitation will not in fact cabin the overly expansive interpretation advanced by the Solicitor General. If the Solicitor General is correct in his suggestion that an employer's use of any physical criterion is virtually conclusive proof that the employer regards people who do not meet that criterion as having a substantially limiting impairment, then an employer's use of blue eyes (or a quarterback's relatively short stature) as a reason not to hire a prospective employee will in every case require an employer to litigate over whether its physical criterion is justified. Whether or not such a statute might make sense, it is decidedly not (and counsel for Mr. Kirkingburg conceded that it is not) the statute that Congress enacted. Congress did not use the "regarded as" prong to do though the backdoor what it refused to do through the front: require an employer to justify every physical criterion it uses to screen job applicants.

This Court should recognize that the "regarded as" prong was intended to address the relatively rare situation in which an employer takes action against an individual because the employer

mistakenly believes that the individual has an impairment that substantially limits a major life activity. The employer's mistake may concern either the existence of the impairment or the degree to which the impairment limits the individual's major life activities, as the EEOC's regulation makes clear, but there must be some such mistake. The "regarded as" test was not intended to require employers to justify qualification standards that separate one group of non-disabled individuals from another.

A real-world example not only illustrates this point, but also shows that the Government does not apply to itself the pious theoretical construct that it enunciated at the oral arguments in both *Sutton* and *Albertsons*. As United observed in its brief (at 12), the United States Navy requires its pilots to have uncorrected visual acuity of 20/30 or better. No such standard applies to other positions within the Navy. In separating those who can be pilots from those who can hold other positions within the Navy, the Navy obviously is distinguishing one category of non-disabled persons from another, not distinguishing those it regards as non-disabled from those it regards as disabled (or as "substantially limit[ed] in one or more * * * major life activities," 42 U.S.C. § 12102(2)(A)). Yet the Solicitor General asked this Court to presume that employers in the private sector ***do*** regard as disabled anyone who cannot meet their vision standards for pilots.

The third prong of the ADA's disability definition was not intended to swallow the first prong, and subject to litigation every employer that makes an employment decision based on a physical characteristic (whether or not an impairment) that does not substantially limits a major life activity. To avoid that result, the "regarded as" prong must be read to apply only when employers reject individuals because they believe them to have ***substantially limiting*** impairments — not merely impairments that render them less than ideally suited, in the employer's view, for the job at issue.

The "regarded as" test did not originate with the ADA. It was part of the Rehabilitation Act for many years before passage of the ADA. See *Forrisi* v. *Bowen*, 794 F.2d 931, 933 (4th Cir. 1986) (quoting former 29 U.S.C. § 706(7)(B), now 29 U.S.C.A. § 705(20)(B)). Yet no appellate court has ***ever*** construed it to bring a nearsighted person within the protected class of "disabled" or "handicapped" individuals. This Court should not be the first.

Respectfully submitted.

LISA HOGAN
Counsel of Record
PATRICK F. CARRIGAN
BETH DOHERTY QUINN
JEANINE M. ANDERSON
Brownstein Hyatt
Farber & Strickland, P.C.
Twenty-second Floor
410 Seventeenth St.
Denver, CO 80202
(303) 534-6335

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MIRIAM R. NEMETZ
JAMES M. OLESKE, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondent

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